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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-262

ELIZABETH RICCI,

PETITIONER,

V.

COUNTY OF RIVERSIDE; R.C. SMITH, DIRECTOR, DEPARTMENT OF BUILDING AND SAFETY FOR THE COUNTY OF RIVERSIDE; WILLIAM O. ALLEE, GENERAL BUILDING INSPECTOR FOR THE COUNTY OF RIVERSIDE,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GEORGE FORMAN
BRUCE R. GREENE
LARRY J. ECHOHAWK
BARBARA FIX
RON ALBU
CALIFORNIA INDIAN LEGAL SERVICES
477 Fifteenth St., Suite 200
Oakland, California 94612
Telephone: 415/465-0320

Attorneys for Petitioner

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COUNTY OF RIVERSIDE; R.C. SMITH, DIRECTOR, DEPARTMENT OF BUILDING AND SAFETY FOR THE COUNTY OF RIVERSIDE; WILLIAM O. ALLEE, GENERAL BUILDING INSPECTOR FOR THE COUNTY OF RIVERSIDE,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Elizabeth Ricci is the beneficial owner of a trust allotment within the Pechanga Indian Reservation, and upon which petitioner and her husband have constructed and are desirous of continuing to improve the dwelling which is the subject matter of this action. Petitioner respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 18, 1974.

OPINION BELOW

The opinion and judgment of the District Court (Appendix A to this Petition) is not reported. The opinion of the Court of Appeals (Appendix B to this petition) is reported at 495 F. 2d 1 (9th Cir. 1974). The Order of the Court of Appeals denying appellant's Petition for Rehearing En Banc (Appendix C to this Petition) is unreported as of this date.

JURISDICTION

The judgment of the Court of Appeals was entered on March 18, 1974. A timely petition for Rehearing and Clarification, and Suggestion for Rehearing En Banc was denied on June 11, 1974, and this Petition

for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

I. Is an appeal properly dismissed as moot when the appellant, having obtained partial injunctive relief in the trial court, but having been denied declaratory relief, is threatened with a repetition and continuation of the conduct sought to be prevented because the respondents claim such conduct is beyond the ambit of the injunction?

II. Does the District Court have subject matter jurisdiction of a case wherein the complaint alleges that the amount in controversy exceeds $10,000, exclusive of interest and costs, the evidence is not inconsistent with that allegation and in fact supports same, and the District Court finds that the allegation respecting the amount in controversy is sustained?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions involved are Article I, clause 3, §8, and Article III of the United States Constitution, 28 U.S.C. §1331, 28 U.S.C. §1337, 28 U.S.C. §2201,

Public Law 280, codified as 18 U.S.C. §1162 and 28 U.S.C. §1360, and Riverside County Ordinance, No. 457, the County Building Ordinance. These constitutional and statutory provisions are set forth in Appendix D to this Petition.

STATEMENT OF THE CASE

Elizabeth Ricci is the beneficial owner of a trust allotment on the Pechanga Indian Reservation. This Reservation was created by Executive Order of the President in 1882, and pursuant to the Mission Indian Relief Act, 26 Stat. 712 (January 12, 1891), a trust patent was issued. The trust status of the land continues to this day.

For many years, Elizabeth Ricci and her husband, George, had desired to live upon the Reservation, since she was very active in Tribal affairs. Thus, they saved their earnings until they were able to afford to build their own home on Mrs. Ricci's allotment, using their own labor. In February, 1971, they began construction of a house for themselves and their family on Mrs. Ricci's trust allotment on the Pechanga Indian Reservation.

Because the Bureau of Indian Affairs, officials of the Pechanga Tribe, neighbors,

and indirectly, a purported Building Inspector for the County of Riverside, all informed Mrs. Ricci that the trust status of her land relieved her of the duty of obtaining a building permit or otherwise complying with the Riverside County Building Code (Ordinance No. 457), she did not obtain a building permit, and the house as constructed did not conform in several minor aspects.[1]

On April 16, 1971, when construction was 90% complete, the County's General Building Inspector became aware of the structure, and he posted the house with a notice calling attention to the County's requirement that a building permit be obtained.

On May 7, 1971, George Ricci was given notice to obtain a building permit and to conform the structure to Code requirements, or face criminal prosecution. Ordinance No. 457, under which the General Building Inspector acted, was duly enacted by the

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1. The principal construction "defect" was the use of unwrapped galvanized pipe in the waste water (not sewage) plumbing system, which might, after passage of a considerable number of years, result in corrosion of the pipe, but which would pose no significant health or other hazard to anyone.

Riverside County Board of Supervisors on July 20, 1959, effective September 1, 1959.

On May 11, 1971, Petitioner Ricci filed her action against respondents herein in the District Court for the Central District of California, invoking that court's jurisdiction under 28 U.S.C. §1331, the case involving both a federal question and an amount in controversy in excess of $10,000, exclusive of interest and costs. Pursuant to the instruction of the District Court, the parties submitted a pre-trial stipulation as to matters of fact and law, and a trial was held on July 8, 1971, all testimonial evidence being introduced by affidavits. On September 9, 1971, the court entered its Judgment and its Findings of Fact and Conclusions of Law, ruling that Mrs. Ricci was not entitled to declaratory relief because the County did posses jurisdiction to enforce its building code against her and her house, but that the County was enjoined from requiring her to obtain a building permit because she had acted reasonably in relying upon the opinions of others that she was not subject to Ordinance No. 457. During the pendency of appellate proceedings herein, the County

has contended that this injunction only relieves her of obtaining a permit, and does not relieve her of the burden of complying with the substantive provisions of the Ordinance.

On March 18, 1974, the Court of Appeals ordered the case dismissed as moot, and also observed that the district court lacked jurisdiction because the amount in controversy had not been demonstrated to a legal certainty. A timely Petition for Rehearing and Clarification, and Suggestion for Rehearing En Banc was filed, and this was denied on June 11, 1974. Circuit Judge Browning was "of the opinion that the petition for rehearing raises substantial doubt as to the soundness of our rulings in Ricci regarding both jurisdiction and mootness."

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF THE UNITED STATES SUPREME COURT REGARDING MOOTNESS.

The issues presented in this case will to a significant extent determine whether Indian people residing upon fed-

erally-created Indian Reservations in California and other P.L. 280 states will be able to satisfy and realize long-delayed needs and aspirations for better homes and fuller lives, or whether those Reservations will exist, albeit tax-exempt, to serve the dominant interests of surrounding non-Indian communities.

No clearer illustration can be given of the fundamental nature of the Indian rights affected by this case than the following colloquy between the trial court and counsel for the County of Riverside:

> "THE COURT: How is he going to live on [Trust Land] without complying with the ordinance?
> MR. BROILES: Live in a tent, I suppose."
> [R.T. p.25, l.1-3].

Petitioner submits that this case is anything but moot. This case is closely analogous to Powell v. McCormack, 395 U.S. 486 (1969), in which a member of Congress sued to regain the seat from which he has been excluded during the 90th Congress. After the Supreme Court had granted certiorari, the 90th Congress terminated, and the Congressman

took the seat to which he had been elected for the 91st Congress. Rejecting defendants' claim of mootness, the court held that the Congressman's interest in the salary withheld from him during the 90th Congress, together with his claim for declaratory relief, provided sufficient basis for the finding of a real, immediate and substantial case or controversy. See also, Bond v. Floyd, 385 U.S. 116 (1966).

The Court of Appeals, in declaring the case moot, placed great reliance upon California v. San Pablo and Tulare R.R. Co., 149 U.S. 308, 313 (1893). However, that case preceded the enactment of the Declaratory Judgment Act (28 U.S.C. §2201) in 1934, and is thus inapposite to a case such as Mrs. Ricci's, where the plaintiff has pleaded a broad claim for declaratory relief which goes beyond the relief granted by the district court. Powell v. McCormack, supra.

The Court of Appeals dismissed Mrs. Ricci's appeal as moot upon the suggestion of the United States as amicus curiae, with the statement that,

> "More than three years have gone by, and we have not been advised that any prosecution

has been instituted by the County against Mrs. Ricci for any violations of the Building Code. We hold that whatever threat there was of prosecution because of other possible violations of the Building Code does not create a substantial controversy of sufficient immediacy and reality to warrant consideration of that part of the judgment below declaring the Riverside County Building Code applied to plaintiff and the Pechanga Indian Reservation." 495 F.2d at p.7.

This holding overlooks the position taken by the County in this case, which position would appear to be based upon the County's unduly narrow reading of the injunction issued by the district court. According to the County,

"The court did not enjoin enforcement of the standards of construction or other provisions of the County Building Code,

merely enforcement of the requirement for obtaining a building permit. It was specifically held that the ordinance was otherwise enforceable against Appellant on the Pechanga Indian Reservation.

"The effect on Appellant of the judgment was to relieve her from the obligation of obtaining a building permit, but to reaffirm the duty of complying with the construction standards of the ordinance which she concedes, were violated by failing to properly wrap a portion of galvanized pipe used in the plumbing system ...For this violation she may be prosecuted." (Appellees' Reply to Amicus Curiae, United States, pp 2-3).

Whether or not the County is correct in the position it has taken, this statement leaves no room for speculation as to the

County's intentions, and the effectuation of these intentions will most assuredly perpetuate this continuing controversy.

It is thus clear that the County has taken the position that Mrs. Ricci must conform her dwelling to the County Code requirements, whether or not she must obtain a permit for construction, and that for her failure to do so, the County will prohibit her from using the structure and will prosecute her if she does use it.

These threats are not illusory or hypothetical; indeed, prior to the filing of this suit in the district court, a cease and desist order was actually attached to the structure, and Mr. Ricci was actually informed that further construction without compliance would result in prosecution (C.T. p.3). That these threats have been renewed by the County in its briefs during the course of the appeal serves to underscore the reality and immediacy of the controversy. Under the judgment of the Court of Appeals, and consistent with the County's interpretation of the district court's decision (an interpretation with which appellant strongly disagrees), the County could, and clearly would proceed to enforce the substantive

provisions of its Building Code against Mrs. Ricci's completed dwelling, necessitating extensive alterations far beyond the means of the Ricci family. As demonstrated by the affidavit of Elizabeth Ricci attached to her Petition for Rehearing in the Court of Appeals, further construction is contemplated, and there is no doubt but that the County will assert its authority to regulate such work.

The Court of Appeals' observation that no actual attempt at enforcement has been made in the three years that this action has been pending is accurate, so far as it goes; however, this non-enforcement cannot be attributed to a decision by the County to acquiesce in the existence and utilization of a non-conforming dwelling. Rather, counsel for the County has informed counsel for petitioner that the County believes that an attempt to enforce the Building Code while this matter is still pending would have been highly improper, a position with which petitioner concurs.

The existence of the actual threat of enforcement of the substantive provisions of the Building Code against Mrs. Ricci's present house, and of the entire Code

against further construction, shows that this case is not moot, and also makes this case virtually indistinguishable from the very recent Supreme Court case of Steffel v. Thompson, ____U.S._____, U.S.L.W. 4357 (Mar. 19, 1974), in which it was held that a reasonably perceived threat of arrest or prosecution was sufficient to establish the existence of a case or controversy upon which an action for declaratory relief could be founded under Article III of the Constitution.

If this Court does not grant this petition to review the judgment of the Court of Appeals that this case is moot, the County will again proceed against Mrs. Ricci, and she will once again have to resort to the district court. The basic facts will be the same except that the dates will be changed; the briefs will be the same; presumably, the result will be the same, as well. Such a procedure would be "destructive of time and energy for all concerned," an inappropriate result under Roe v. Wade, 410 U.S. 113,123 (1973).

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II.

THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF THE UNITED STATES SUPREME COURT OF APPEALS FOR THE NINTH CIRCUIT REGARDING THE SUFFICIENCY OF THE AMOUNT IN CONTROVERSY.

As has been held by numerous decisions of the Ninth Circuit, an appellate court will not overturn a district court's finding of the existence of the jurisdictional amount unless it can be said "with 'a legal certainty' that the value of the matter in controversy is really less than the jurisdictional amount." Kimball v. Callahan, et al., 493 F. 564 (9th Cir. 1974); See also, City of Inglewood v. City of Los Angeles, 451 F. 2d 948 (9th Cir. 1972); Holcomb v. Confederated Tribes of the Umatilla Indian Reservation, 382 F. 2d 1013 (9th Cir. 1967); Smallfied v. Home Insurance of New York, 244 F. 2d 337 (9th Cir. 1957). Further, the Court of Appeals has no power to make its own, independent factual inquiry. Panaview Door and Window Co., v. Reynolds Metals Co., 255 F. 2d 920 (9th Cir. 1958). The Court of Appeals' decision thus stands in

conflict with virtually every other decision on this point in the Ninth Circuit.

The cases relied upon by the Court of Appeals are not to the contrary. In California v. La Rue, 409 U.S. 109 (1972), the parties joined in a request that a three-judge district court review the constitutionality of State liquor regulations; the question was thus whether there was a case or controversy, and not whether the jurisdictional amount was present. In Mitchell v. Maurer, 293 U.S. 237 (1934), the absence of requisite diversity was patently obvious on the pleadings, and could not be found to exist on the record before the court. Continental Insurance Co. of N.Y. v. Cotten, 427 F. 2d 48 (9th Cir. 1970) also involved the appearance of a jurisdictional defect on the face of the pleadings. In Canadian Indemnity Co. v. Republic Indemnity Co., 222 F. 2d 601 (9th Cir. 1955), a diversity suit, there was neither an allegation nor proof of the amount in controversy.

Thus, these cases, while the facts of these present appropriate circumstances for a jurisdictional inquiry by an appellate court, none of them is apposite to Mrs.

Ricci's case.

It is clear from the record in this case that Mrs. Ricci did not bring suit to protect an abstract interest in some building materials; rather, she sought to protect her right to complete and utilize an entire dwelling which has been constructed by the labor of her husband and herself. The completed dwelling was at issue, and the court necessarily and properly concluded that the cost of the materials together with the reasonable value of the weeks of labor spent on the project, exceeded $10,000, exclusive of interest and costs.

Nothing in the record indicates that this finding of fact by the district court is unsupported by the record. The uncontroverted affidavit of Elizabeth Ricci (C.T. p.10) states that the cost of materials alone exceeded $4,000. It is a matter of common knowledge that building materials can only be transformed into a dwelling by means of labor, and that labor is expensive. The validity of the court's finding is supported by the affidavit of Elizabeth Ricci, dated April 26, 1974, wherein she states that to date,

"We have put far more than

> $10,000 worth of materials and labor into building the home . . ."

Thus, there was no question that the value of the house exceeded $10,000, and for this reason, the existence of the amount in controversy was never seriously questioned during this litigation.

In view of the fact that the Court of Appeals has first raised the question of the district court's jurisdiction in its decision, without giving the parties an opportunity to brief the issue or to produce additional proof, either in that court or on remand to the district court (see, e.g. City of Kenosha v. Bruno, 412 U.S. 507, 514), petitioner submits that it would have been appropriate, in the interests of justice and judicial economy, for the court to have considered an additional, alternative source of jurisdiction for the district court.

At issue in this case is the effect and meaning of a federal statute purporting to transfer certain jurisdiction over Indian country from the United States to the States within which such Indian country is located. The transfer of even limited jurisdiction

from federal to state authorities has a significant impact upon and is intended to regulate commerce with Indian tribes. Federal authority to regulate commerce with Indian tribes is derived from Art. I, §8, cl. 3 of the United States Constitution. McClanhan v. Arizona Tax Commission, 411 U.S. 164, (1973), footnote 7.

As an action arising under an Act of Congress (18 U.S.C. §1162, 28 U.S.C. §1360) regulating commerce, this case is cognizable under 28 U.S.C. §1337. Actions brought under §1337 need not involve an amount in controversy in excess of $10,000. Bloomfield Steamship Co., v. Sabine Pilots Ass'n. 262 F. 2d 345 (5th Cir. 1959), and no jurisdictional amount needed to have been proven in this case.

Thus, because the facts contained in the record do not affirmatively show that the value of the matter in controversy did not exceed $10,000, and because the finding of the existence of the jurisdictional amount, based upon the same record, was not "clearly erroneous," the Court of Appeal erred in conducting its own factual inquiry, and reached an erroneous factual conclusion. Because of these errors, the district court

cannot be found to have lacked jurisdiction of the subject matter.

Further, because a basis for jurisdiction exists without regard to whether the amount in controversy exceeds $10,000, the Court of Appeals should not have, after three years of litigation, extensive briefing, oral argument, and anxious expectation by the parties, avoided a decision of this important case.

CONCLUSION

Because this case presents issues of paramount importance to thousands of Reservation Indians in a factual context which demonstrates the continued existence of a genuine and immediate controversy, the Court of Appeals should not have dismissed petitioner's appeal as moot. Because there was an adequate showing of the existence of the requisite amount in controversy, the Court of Appeals erred in holding that the district court was without jurisdiction. For these reasons, petitioner prays that her petition for a Writ of Certiorari be granted.

DATED: September 6, 1974

Respectfully submitted,

GEORGE FORMAN
BRUCE R. GREENE
LARRY J. ECHOHAWK
BARBARA FIX
RON ALBU
CALIFORNIA INDIAN LEGAL
SERVICES

By: _____
GEORGE FORMAN
Attorneys for Petitioner

APPENDIX A

APPENDIX A

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

September 9, 1971

ELIZABETH RICCI,
Plaintiff,
v.
COUNTY OF RIVERSIDE, et al.,
Defendants.
C. NO.71-1134 EC

UNITED STATES OF AMERICA,
Plaintiff,
v.
COUNTY OF RIVERSIDE, et al.,
Defendants.
C. NO.71-1297 EC

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above consolidated actions came on regularly for trial July 6, 1971. All parties to the actions, by and through their respective counsel, stipulated that the evidence in the cases would be adduced by affidavits; and exhibits to the pleadings and affidavits were to be deemed exhibits in evidence in addition to the exhibits introduced at trial and that at the hearing on the motion for preliminary injunction held May 24, 1971.

The Court, Honorable E. Avery Crary, District Judge, presiding, having heard and considered the evidence and arguments of counsel, and the cases having been submitted for decision, finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. The matter in controversy in this action exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

2. Plaintiff, Elizabeth Ricci, is a resident of the State of California and an enrolled member of the Pechanga Band of Mission Indians.

3. The Pechanga Band of Mission Indians is an Indian Band with a governing body duly recognized by the Secretary of the Interior. The Pechanga Band of Mission Indians is not a chartered Federal corporation under the Indian Reorganization Act of June 18, 1934, (Wheeler-Howard Act) c. 576, 48 Stat. 984, as amended 25 U.S.C. §§461 et seq., with powers to manage the affairs of its members. Chapter I Appendix, 25 C.F.R. at 418 (1971).

4. The Pechanga Indian Reservation

is located near the town of Temecula within the boundaries of the County of Riverside, State of California. The reservation contains approximately 4,100 acres and was initially established by Executive Order of the President on June 27, 1882. The land within the reservation, including Plaintiff Ricci's alloted land, is held in trust by the United States of America pursuant to the Mission Indian Relief Act of January 12, 1891, c. 65, 26 Stat. 712 and later amendments.

5. Defendant, County of Riverside, is a political subdivision of the State of California. Defendant, R.C. Smith is the Director of the Department of Building and Safety for the County of Riverside and is the person primarily responsible for the enforcement of the County's Building Ordinance (Ordinance No. 457). Defendant, William O. Allee, is an employee of the Department of Building and Safety, County of Riverside.

6. Riverside County Ordinance No. 457 was regularly adopted by the Riverside County Board of Supervisors on July 20, 1959, effective September 1, 1959, and is still in full force and effect. As adopted, the Ordinance purports to apply to all lands

located within the boundaries of Riverside County.

As amended, the Ordinance adopts certain provisions of the Uniform Building Code (1970 ed.), the Uniform Mechanical Code (1970 ed.) the Uniform Plumbing Code (1970 ed.), the Uniform Wiring Code (1968) ed.] and the National Electrical Code (1968 ed.). The adoption of these Codes is authorized by Sections 50022.1 to 50022.8 of the California Government Code. Neither plaintiff challenges the Riverside County Building Ordinance as being unreasonable in its requirements.

7. In February, 1971, with the intent of moving onto the reservation from her residence in Los Angeles, Plaintiff Elizabeth Ricci and her husband began construction of a dwelling on her 5 acres of allotted land within the Pechanga Indian Reservation. The site of the dwelling is located along the north boundary of the westerly projection of the Pechanga Indian Reservation in Section 28, Township 8 South, Range 2 West, S.B.B.M., southwest of the point where Pala Road crosses Pechanga Creek and enters the Pechanga Indian Reservation. At the time of trial Plaintiff Ricci and her family were

occupying the dwelling. The construction of the dwelling was not sponsored, financed, supervised or regulated by the Federal Government.

8. Plaintiff Elizabeth Ricci did not obtain a building permit prior to commencing construction of her dwelling as required by Riverside County Ordinance No. 457.

9. On April 26, 1971, when the construction of the Ricci dwelling was almost complete, a Notice signed by defendant William O. Allee, was posted on the door of the dwelling. The Notice stated that the construction was in violation of the Riverside County Building Code, Ordinance No. 457, in that no permit had been first obtained, and directed the owner to stop work and appear at the office of the Building Director within 5 days to show cause why the matter should not be referred to the District Attorney.

10. On May 7, 1971, agents of the County of Riverside's Department of Building and Safety, including defendant, William O. Allee, entered upon the premises of Ricci dwelling and ordered the husband of Plaintiff Elizabeth Ricci, to desist from further

construction of the dwelling until a building permit has been obtained.

11. Although Plaintiff Elizabeth Ricci attempted to generally conform to the construction standards of the Riverside County Building Code and the City of Los Angeles Building Code, the dwelling fails to fully conform to the construction standards of the Riverside County Building Code, Ordinance No. 457.

12. The Federal Government has not established standards for construction generally on Indian Reservations except as to Government sponsored, financed and controlled projects.

13. In failing to obtain a building permit Plaintiff Ricci and her husband, in view of the confusion and conflicting opinions from Federal, State and County authorities and the Pechanga Tribe as to the necessity of Indians occupying trust property to conform to County Building Ordinances, were acting reasonably in relying upon:

a) a letter dated February 19, 1970, from an employee of the County of Riverside's Department of Building and Safety to Frank Magee, a

neighbor of the Piggie on the reservation, that stated ". . . buildings constructed on Indian Reservations are exempt from permit," and

b) the legal opinion issued by the Solicitor of the United States Department of the Interior dated February 7, 1969, number M-36768, which stated in part that Public Law 280, as amended by 18 U.S.C. §1162, 28 U.S.C. §1360, "furnishes no basis for the application of state or local zoning, construction, or other land use laws, regulations, or standards to trust property," and

c) the legal opinion issued by the Regional Solicitor of the United States Department of the Interior dated March 27, 1969, which stated in part that "county and state laws which purport to regulate the use of land . . . have absolutely no force or

effect upon Indian trust lands, and

d) the fact that no building permit had ever been issued for any construction occurring on the Pechanga Indian Reservation nor had any enforcement procedures been commenced by the County of Riverside for any construction on the Pechanga Indian Reservation, prior to that time.

14. It was not established that Plaintiff Ricci was aware that building permits had been issued by the County of Riverside for construction on four other Indian reservations located within the county, nor was it established that the permits that were issued on the other reservations were for construction undertaken by Indians on their own trust allotments.

16. [sic] The following conclusions of law, insofar as they be construed findings of fact, are, so found by this court to be true in all respects.

CONCLUSIONS OF LAW

1. The foregoing findings of fact, to the extent they are conclusions of law, shall be considered as conclusions of law.

2. This Court has jurisdiction of the parties and subject matter of both consolidated actions.

3. Riverside County Ordinance No. 457 is a valid police power regulation adopted pursuant to the authority of Article XI, Section 7 of the California Constitution for the purpose of protecting the public health and safety. It is a law of the State of California of general application. Atlantic Coast Line R. Co. v. City of Goldsboro, 232 U.S. 548, 555 (1914); Restatement (second), Conflict of Laws 2d, §3, comment b (1969); Restatement, Conflict of Laws, §2, comment b (1934).

4. Public Law 280, as codified in 18 U.S.C. §1162 and 28 U.S.C. §1360, removed the Indians of California from the exclusive jurisdiction of the Federal Government (Department of the Interior) and extended to Indian Reservations and the Indian allottees of Indian Trust Lands, the substantive civil laws of the State insofar

as its laws are of general application to private persons and private property. With certain limitations, the Act also extended the State laws to real and personal property belonging to an Indian tribe that is held in trust by the United States. Congress, however, did not grant authority for California to encumber trust held Indian property, or to regulate the use of such property inconsistent with any Federal treaty, agreement, statute or valid regulation made pursuant thereto. 18 U.S.C. §1162(b); 28 U.S.C. §1360(b).

5. Ordinance No. 457 of the County of Riverside is not an encumbrance within the meaning of that term used in 18 U.S.C. §1162(b) and 28 U.S.C. §1360(b), or as the term was applied by the Supreme Court of Washington in Snohomish County v. Seattle Disposal Company, 70 Wash. 2d 668, 425 P.2d 22 (1967), cert. denied, 389 U.S. 1016 (1967).

6. The word "encumbrance" as used in 18 U.S.C. §1162(b) was not intended by Congress to be given an expanded definition beyond its usual interpretation of a burden of land which may impair alienability of the fee, such as a mortgage, lien, or easement. Rincon Band of Mission Indians

v. County of San Diego, 324 F. Supp. 371, 376 (S.D. Cal. 1971); People v. Rhoades, 12 Cal. App. 3d 720, 90 Cal. Rptr. 794 (1970).

7. Riverside County Ordinance No. 457, though it may technically regulate the use of land, is not a regulation of the use of Indian trust property inconsistent with any Federal treaty, agreement, statute or with any valid regulation made pursuant thereto.

8. It does not appear from the statute or the legislative history of the Act of February 15, 1929, c. 216, 45 Stat. 1185, as amended, 25 U.S.C. §231, that Congress intended to preempt the entire field of regulating health and sanitation on Indian lands. Federal statutes regulating health and safety will not be held preemptive of the field unless Congress clearly manifests a purpose to that effect. Head v. New Mexico Band of Examiners in Optometry, 374 U.S. 424 (1963); Reid v. Colorado, 187 U.S. 137, 148 (1902); United States v. Hatahley, 220 F. 2d 666 (10 Cir. 1955), reversed on other grounds, 351 U.S. 173.

9. The Act of February 15, 1929, c. 216, 45 Stat. 1185, as amended, 25 U.S.C.

§231, does not require implementing regulations of the Secretary of the Interior. Organized Village of Kake v. Egan, 369 U.S. 60, 73-74 (1962); Snohomish County v. Seattle Disposal Co., 70 Wash. 2d 668, 425 P. 2d, 22, 27 (1967); Acosta v. County of San Diego, 126 Cal. App. 2d. 455, 563, 272 P. 2d 92 (1954).

10. Defendants are entitled to a judgment declaring that they have jurisdiction over the allotment of Elizabeth Ricci, and the Pechanga Indian Reservation to enforce Riverside County Ordinance No. 457, regulating construction, even though the said allotment and the Pechanga Indain Reservation are owned in trust by the United States of America.

11. In view of the special circumstances, it would be inequitable and a denial of due process to require plaintiff Ricci at this time to obtain a building permit for the construction of her dwelling on the Pechanga Indian Reservation.

12. Plaintiff Ricci is entitled to a permanent injunction restraining the Defendants from requiring her to obtain a building permit for the construction of the existing dwelling on her trust allotment in the Pechanga Indian Reservation.

13. Each party shall bear their own costs in Civil Action No. 71-1134-EC. Defendants are entitled to costs in Civil Action No. 71-1297-EC.

Dated: September 9, 1971

s/ E. Avery Crary
United States District Judge

ELIZABETH RICCI, Plaintiff, v. COUNTY OF RIVERSIDE, et al., Defendants.	Civ. No. 71-1134-EC
UNITED STATES OF AMERICA, Plaintiff, v. COUNTY OF RIVERSIDE, et al., Defendants.	Civ. No. 71-1297-EC JUDGMENT

The above consolidated actions came on for trial July 6, 1971, and the Court, Honorable E. Avery Crary, District Judge, presiding, having tried the issues and having heretofore filed its Findings of Fact and Conclusions of Law, and a decision having been duly rendered, it is hereby

ORDERED, ADJUDGED AND DECREED

1. That Defendants have jurisdiction over the allotment of Elizabeth Ricci, and the Pechanga Indian Reservation to enforce Riverside County Ordinance No. 457, regulating construction, even though the said

allotment and the Pechanga Indian Reservation are owned in trust by the United States of America.

2. That a permanent injunction shall issue restraining Defendants, and each of them, from requiring Plaintiff Ricci, her agents or employees, to obtain a building permit for the continued construction of the

in the Pechanga Indian Reservation.

3. That each party bear its own costs in Civil Action No. 71-1134-EC.

4. That Defendants recover of the plaintiff their Costs of Action in Civil Action No. 71-1297-EC.

Dated: September 9, 1971

s/ E. Avery Crary
United States District Judge

APPENDIX B

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELIZABETH RICCI, Appellant, v. COUNTY OF RIVERSIDE; R.C. SMITH, Director, Department of Building and Safety for the County of Riverside; WILLIAM O. ALLEE, General Building Inspector for the County of Riverside, Appellees.	)	NO. 72-1256

[This opinion was rendered in conjunction with opinions in Rincon Band of Mission Indians v. County of San Diego, et al., No. 71-1927 and Madrigal v. County of Riverside, et al., No. 71-2043]

* * *

In Ricci there is a similar question of justiciability. Ricci, an Indian women with an allotment within the Pechanga Reservation in the County of Riverside, had almost completed the construction of a house on her allotment when the defendants' agents posted the house with a notice calling

attention to the requirement of a Riverside County ordinance that there be a building permit, and a subsequent notice served on plaintiffs' husband to obtain a building permit or face criminal prosecution. In addition to failing to secure a building permit, Ricci had failed to comply with the Riverside County Building Code requiring galvanized pipe be used in the plumbing system and that a portion of such pipe be wrapped in a protective covering.

Thereupon Mrs. Ricci instituted an action in the District Court of California, Central District, for an injunction restraining the County of Riverside from requiring a building permit and for a declaratory judgment that Riverside County Building Code (Ordinance No. 457) was not applicable to a building on Indian land held by the United States. Jurisdiction was claimed pursuant to 28 U.S.C. §1331(a), which provides:

> "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

A bench trial was had exclusively on affidavits, a stipulation of facts, and exhibits. There was no testimony.

Judgement was entered on September 9, 1971, (1) enjoining defendants from requiring plaintiff to obtain a building permit and (2) declaring the Riverside County Building Code did apply to plaintiff and the Pechanga Indian Reservation. Plaintiff appeals from the entire judgment and not that part of judgment, as she states in her brief, which made the declaration of the applicability of the Riverside County Building Code.

United States, in its amicus brief, has suggested "since Mrs. Ricci's immediate grievance, as expressed in her complaint and brief, related to her ability to build her home free of county control, she has substantially prevailed in the District Court. Amicus therefore submits that the question of Riverside County's powers to regulate other construction on Elizabeth Ricci's trust allotment is purely artificial and hypothetical on the present record and therefore moot in this case at this time." In California v. San Pablo & T.R.R., 149 U.S. 308, 313 (1893), the Supreme Court held

that California's action for taxes was moot after the defendant paid them, despite the fact that the state still wished a decision on the merits and other cases turned by stipulation, on the outcome of this one. It held:

> "[T]he state has obtained everything that it could recover in this case by a judg- of this court in its favor. The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it." 149 U.S. 313.

More than three years have gone by, and we have not been advised that any prosecution has been instituted by the county against Mrs Ricci for any violations of the Building Code. We hold that whatever threat

there was of prosecution because of other possible violations of the Building Code does not create a substantial controversy of sufficient immediacy and reality to warrant consideration of that part of the judgment below declaring the Riverside County Building Code applied to the plaintiff and the Pechanga Indian Reservation. See our discussion in Rincon, supra, p.5-8. Mrs. Ricci's appeal, therefore, is dismissed as moot. Having arrived at that conclusion, "we are precluded from considering any other issues presented for review" (Blackman, J., concurring in O'Shea v. Littleton, supra, at ____, 42 U.S.L.W. 4144,

Although no one has raised the issue, we call to the District Court's attention the matter of its own jurisdiction.

Under the federal question jurisdiction, 28 U.S.C. §1331, one of the two requirements for jurisidiction is that the matter in controversy be more than $10,000.

We explain in Quinault Tribe of Indians v. Gallagher, 368 F. 2d 648, 654 (9th Cir. 1966), what the "matter in controversy" means:

> "By 'matter in controversy' is meant the subject of liti-

> gation, the matter upon which the issue is brought and issue is joined. Smith v. Adams, 130 U.S. 167, 175, 9 S.Ct. 566, 32 L.Ed. 895. The value of the right sought to be gained determines the amount in dispute. Federated Mutual Implement & Hardware Insurance Co. v. Steinheider, 8th Cir., 258 F. 2d 734, 738."

Cf., Packard v. Banton, 264 U.S. 140, 142 (1924).

An examination of every affidavit, exhibit and stipulation in the record reveals only two instances where money is mentioned. On page 10 of the affidavit of plaintiff she states, in part, that the material for the building of the home cost $4,000.

The amount in controversy is specifically denied by defendant's answer (Rec. p.187, par. 1). However, there is a stipulation signed by the attorneys for the parties, dated the blank day of June, 1971 and filed in the court below on July 15, 1971, which read as follows:

II

JURISDICTION AND VENUE

> "Federal jurisdiction and venue for the trial of this matter

is present on the following grounds:

> "a) Jurisdiction of this court as to action No. 71-1134-FC is conferred by and founded upon 28 U.S.C. §1331 in that this is an action arising under the Constitution, laws or treaties of the United States and the value of the rights sought to be protected exceeds Ten Thousand Dollars ($10,000.00) exclusive of interest and costs. * * *"

It is hornbook law that jurisdiction of a District Court cannot be stipulated to by the parties, and that the court sua sponte must satisfy itself that jurisdiction exists. California v. La Rue, 409 U.S. 109, 112-113 fn. 3 (1972); Mitchell v. Maurer, 293 U.S. 237, 244 (1934); Continental Ins. Co. of N.Y. v. Cotten, 427 F. 2d 48, 51 (9th Cir. 1970); Canadian Indemnity Co. v. Republic Indemnity Co., 222 F. 2d 601, 603 (9th Cir. 1955); Law of the Federal Courts, Charles Alan Wright (1970), §66.

There being no proof that the matter in controversy exceeded $10,000, there was no jurisdiction of the District Court. The prayer for a declaratory judgment fails,

too, since an action for declaratory judgment has no jurisdictional basis per se. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, (1957); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937).

* * *

APPENDIX C

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELIZABETH RICCI, Appellant, v. COUNTY OF RIVERSIDE; R.C. SMITH, Director, Department of Building and Safety for the County of Riverside; WILLIAM O. ALLEE, General Building Inspector for the County of Riverside, Appellees.	)	NO. 72-1256 ORDER

Before: BROWNING and TRASK, Circuit Judges, and *MURPHY, District Judge

A majority of the panel as constituted in the above case has voted to deny the petition for rehearing and for clarification and to reject the suggestion for a rehearing en banc.

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*Honorable Thomas F. Murphy, Senior United States District Judge, Southern Distrit of New York, sitting by designation.

Judge Browning is of the opinion that the petition for rehearing raises substantial doubt as to the soundness of our rulings in Ricci regarding both jurisdiction and mootness. He would call for a response to the petition pursuant to Fed. R. App. P.40 (a). He votes, however, to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P.35(b).

The petition for rehearing and for clarification is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

APPENDIX D

Statutory Provisions

United States Constitution

Art. I, §8, cl.3

The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Art. III, §2

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; ——to all Cases affecting Ambassadors, other public Ministers and Consuls;——to all Cases of admiralty and maritime Jurisdiction; —— to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizen of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

United States Code

18 U.S.C. §1162. State jurisdiction over offenses committed by or against Indians in Indian Country.

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian Country affected
Alaska	All Indian country within the Territory
California.....	All Indian country within the State
Minnesota.....	All Indian country within the State, except the Red Lake Reservation
Nebraska.....	All Indian country within the State
Oregon.....	All Indian country within the State, except the Warm Springs Reservation
Wisconsin.....	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section.

28 U.S.C. §1331 Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein in the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. §1337 Commerce and anti-trust regulations

The district courts shall have original jurisdiction of any civil

action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

28 U.S.C. §1360 State civil jurisdiction in actions to which Indians are parties

(a) Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian country affected
Alaska.....	All Indian country within the Territory
California.....	All Indian country within the State
Minnesota.....	All Indian country within the State, except the Red Lake Reservation
Nebraska.....	All Indian country within the State
Oregon.....	All Indian country within the State, except the Warm Springs Reservation

Wisconsin..... All Indian country within the State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State or adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

28 U.S.C. §2201 Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such

declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

RIVERSIDE COUNTY

ORDINANCE NO. 457

The Board of Supervisors of the County of Riverside, State of California, do ordain as follows:

* * *

Section 2.

I. Whenever any building, mechanical, plumbing or electrical work is being or has been done contrary to provisions of this ordinance, the Building Director may order the work stopped or occupancy of the building terminated, or both, by notice in writing served upon any persons engaged in the doing, or causing such work to be done and any such person shall forthwith comply with such order until otherwise authorized by the Building Director.

/////

APPLICATION

Section 3.

A. This ordinance shall apply to all buildings and structures, or parts thereof in the unincorporated area of the County of Riverside, unless hereafter specifically exempted.

B. The structural regulations contained in this ordinance shall not apply to the following buildings and structures:

1. Any building or structure constructed as a barn, hayshed, granary, livestock shed, implement shed, or shelter for birds or animals.

3. Open wire or open frame fences six feet or less in height, or masonry fences three feet or less in height.

C. Whenever any building or structure that does not require a building permit is to be constructed, a "Registration Certificate" shall be obtained from the Department of Building and Safety prior to the start of construction. The

certificate shall be issued on payment of a $5.00 fee, and shall show the location, nature, and estimated cost of construction.

D. Notwithstanding any other provision of this ordinance, no person shall construct a building designed or intended for human occupancy as a dwelling or otherwise, or thereafter use the same for such human occupancy, on any land the surface of which is 220 feet or more below sea level, and no building permit shall be issued therefore, unless such construction on such land shall be specifically permitted by provisions of the county zoning ordinance or proceedings thereunder.

E. Back yard shelters designed and built for refuse or protection of human beings in the event of military attack or other major disaster shall be exempt from the payment of any fees under this ordinance, but shall be subject to all other require-

ments hereof including the requirements for obtaining permits, provided said shelters conform substantially to standards issued or approved by state or federal civil defense and disaster agencies.

F. No building permit shall be issued by the Building Director for any structure if the construction thereof shall violate any provision of the County zoning and subdivision ordinances.

G. There is hereby created the "Street Tree Committee," which shall consist of the Planning Director, who shall be Chairman, the Road Commissioner, the Director of Building and Safety, and the Parks Director, or their representatives. The duties of the Committee shall be as follows:

1. To develop, prepare and keep current a Stree Tree Planting Manual, for adoption by resolution of the

Board of Supervisors. The Committee, shall, from time to time, recommend amendments to the Manual for adoption by the Board.

2. To process applications for permits to plant local street trees, including requests for exceptions from tree planting requirements.

3. To enforce the tree planting requirements.

H. No final inspection of any residental, commerical or industrial building fronting upon a street, whether public or private, shall be made by the Department of Building and Safety unless the owner thereof has planted a tree or trees as hereafter required or has been relieved from the requirement to plant trees.

I. When a person applies for a building permit to construct a residential, commercial or industrial building that fronts upon a street, whether public or private, the Department of

Building and Safety shall furnish him with an Application to Plant Street Trees and a copy of the Street Tree Planting Manual.

1. The applicant shall furnish all required information including the following:
   (a) Location of the property.
   (b) The type of soil on the property.
   (c) Availability of water to the property.
   (d) Type of other trees in the right of way within 300 feet, or the next intersecting streets on each side of the property.
   (e) Tree species preferred by applicant (3 choices).
   (f) Plat map of parcel of property, including driveway location.
2. The application shall be filed together with the application for a building permit and shall be referred to the Road Department for processing and

determination of tree planting requirements. The application shall then be returned to the Department of Building and Safety and the permittee shall be notified of the tree planting requirements.

3. A person may be relieved of the requirement to plant street trees by the Committee, if the Committee finds any of the following conditions to exist:

   (a) That tree planting is impractical due to unsatisfactory soil, rock, grade or other typographical conditions that cannot readily be corrected.

   (b) That a satisfactory water supply is not available.

   (c) That tree planting will create conditions hazardous to traffic.

   (d) That the streets is likely to be widened within a

reasonable period of time and trees cannot now be set in their proper relationship to the ultimate right of way.

(e) That trees are already planted in the substantially correct location.

4. If a person desires to be relieved from the requirement to plant street trees he shall, in addition to filling out the first part of the application, also complete the part thereof entitled Request for Exception from Planting Street Trees. The applicant may request a hearing thereon at the time of filing his application for an exception.

5. Whenever the applicant requests that he be relieved from tree planting requirements, the application shall be forwarded by the Department of Building and Safety to the Planning Department.

The Planning Department shall investigate and study the request for exception and confer thereon with the Road Department. If the applicant has requested a hearing, the Planning Department shall set the matter for an informal hearing before the Planning Department and Road Department representatives of the Committee and shall give notice thereof to the applicant. The hearing shall be held not less than 2 nor more than 4 weeks after the filing of the application. The Planning Department shall notify the applicant by mail of the decision upon his request for exception, whether or not a hearing is held on the matter and shall forward a copy to the Department of Building and Safety.

6. If the applicant does not agree with the decision, he

shall have the right to appeal the matter to the Board of Supervisors, by notifying the Planning Department, by letter, within 10 days of the mailing of the decision by the Planning Department. The Planning Department shall thereupon forward the matter to the Board of Supervisors together with the decision and recommendations of the Committee. The Board of Supervisors may set the matter before itself for an informal hearing or it may accept the recommendations and deny the request for a hearing. If the matter is set for hearing before the Board, it shall be set not less than 2 nor more than 4 weeks after the filing of the appeal.

The Clerk of the Board shall notify the applicant and the Committee of any

hearing dates and decisions of the Board.

J. All tree planting requirements shall be determined in accordance with the regulations contained in the Street Tree Planting Manual, as adopted by the Board of Supervisors. The manual shall contain the types of trees, the required spacing of trees, the standards for tree location, the planting and maintenance directions, the correct season for planting of various species of trees, the conditions of trees to be planted, and other pertinent requirements.

BUILDING CODE

Section 4.

The Uniform Building Code, Volume I, 1970 Edition, including Appendix thereof and including the Standards referred to in Section 6002, as adopted by the International Conference of Building Officials, is hereby adopted as part of the Building Code of the County of Riverside and made a part of this ordinance by reference (three copies of which are on file for use and examination by the public in the

office of the County Clerk), with the following modifications:

1. Sections 201, 202, 205, the second exception of 1102(b), 1311, 1410, 1506, 1601, 1602, 1603(a) and (b), 6001, 6003 and 6004 of the Uniform Building Code are deleted.
2. Section 203 of the Uniform Building Code is amended by deleting the last sentence thereof and by adding the following paragraphs:

   Any structure or building, or portion thereof, including any dwelling unit, guest room or suite of rooms, or the premises on which the same is located, in which there exists any of the following listed conditions to an extent that endangers the life, limb, health, property, safety, or welfare of the public or any occupants thereof shall be deemed and hereby is declared to be an unsafe structure or an unsafe building:

1. Inadequate sanitation, which shall include but not be limited to the following:
   a. Lack of, or improper water closet, lavatory, kitchen sink, bathtub or shower in a dwelling unit.
   b. Lack of, or improper water closets, lavatories, and bathtubs or showers per number of guests in hotel.
   c. Lack of hot and cold running water to plumbing fixtures in a hotel.
   d. Lack or improper operation of required ventilating equipment.
   e. Lack of minimum amounts of natural light and ventilation required by this Code.
   f. Room or space dimension less than required by this Code.
   g. Lack of required electrical lighting.

h. Dampness of habitable rooms.

i. Infestation of insects, vermin or rodents.

j. General dilapidation, obsolescence or disrepair.

k. Lack of connection to required sewage disposal system.

2. Structual hazards, which shall include but not be limited to the following:

a. Deteriorated or inadequate foundations.

b. Defective, deteriorated or inadequate flooring or floor supports.

c. Members of walls, partitions, or other vertical supports that split, lean, list, or buckle due to defective material, deterioration or insufficient size.

d. Members of ceilings, roofs, ceiling and roof supports or other hori-

zontal members which sag, split, or buckle due to defective material, deterioration, or insufficient size.

e. Fireplaces or chimneys which list, bulge, or settle, due to defective material, deterioration, or insufficient size or strength.

3. Hazardous Wiring. All wiring except that which conformed with all applicable laws in effect at the time of installation and which has been maintained in good condition and is being used in a safe manner.

4. Hazardous Plumbing. All plumbing except that which conformed with all applicable laws in effect at the time of installation and which has been maintained in good condition and which is free of cross connections and siphonage between fixtures.

5. Hazardous Mechanical Equipment. All mechanical equipment, including vents, except that which conformed with all applicable laws in effect at the time of installation and which has been maintained in good and safe condition.

6. Faulty Weather Protection, which shall include but not be limited to the following:

   a. Deteriorated, crumbling, or loose plaster.

   b. Deteriorated or ineffective waterproofing of exterior walls, roof, foundations, or floors, including broken windows or doors.

   c. Defective or lack of weather protection for exterior wall coverings, including lack of paint, or weathering due to lack of paint or other approved protective covering.

   d. Broken, rotted, split, or buckled exterior wall coverings or roof coverings.

7. Fire Hazard. Any building or portion thereof, device, apparatus, equipment, combustible waste, or vegetation which is in such a condition as to cause a fire or explosion or provide a ready fuel to augment the spread and intensity of fire or explosion arising from any cause.

8. Faulty Materials of Construction. All materials of construction except those which are specifically allowed or approved by or pursuant to this Code and which have been adequately maintained in good and safe condition.

9. Unsanitary Premises. Any building or structure within or under which there is a substantial accumulation of debris, rubbish, garbage, offal, stagnant water, combustible materials, or other similar materials or conditions, or combination thereof, in such quantity as to consti-

tute fire, health or safety hazards.

10. Inadequate Exits. All buildings or portions thereof not provided with adequate exit facilities as required by this Code except those buildings or portions thereof whose exit facilities conformed with all applicable laws at the time of their construction and which have been adequately maintained and increased in relation to any increase in occupant load, alteration or addition, or any change in occupancy. When an unsafe condition exists through lack of, or improper location of exits, additional exits may be required to be installed.

11. Inadequate Fire-Protection or Fire-Fighting Equipment. All buildings or portions thereof which are not provided with the fire resistive construction or fire-extinguishing systems or equipment required by this

Code except those buildings or portions thereof which conformed with all applicable laws at the time of their construction and whose fire resistive integrity and fire-extinguishing systems or equipment have been adequately maintained and improved in relation to any increase in occupant load, alteration or addition, or any change in occupancy.

12. Improper Occupancy. All building or portions thereof occupied for living, sleeping, cooking or eating purposes which were not designed or intended to be used for such occupancies.

2.1 Abatement Proceedings.

(a) Public Nuisance. Any building or structure which has become unsafe is hereby declared to be a public nuisance which shall be abated by repair, demolition or removal, in accordance with the procedure hereinafter specified.

/////

(b) First Notice, The Building Director, upon determination that a building or structure is unsafe shall give a written Notice of Defects to all parties concerned in the manner hereinafter stated. The notice shall specify the conditions which render the building or structure unsafe and if, in the opinion of the Building Director, such conditions can be corrected by repair, the notice shall state the work that is necessary to repair or rehabilitate the building or structure. The notice shall require the owner to obtain all necessary permits from the Department of Building and Safety and to correct or abate the unsafe conditions, either by repair, demolition or removal within 30 days after the date of notice. If a building is encumbered by a mortgage or deed of trust of record, and the owner of the building shall not have complied with the order on or before the expiration of 30 days after the mailing and posting of the notice, the mortgagee or beneficiary under the deed of trust may, within 15 days after the expiration of the 30-day period, comply with the requirements of the notice.

(c) Manner of Giving Notice. The

Building Director shall post a copy of the Notice of Defects in a plainly visible place on the building or structure and he shall send a copy, by registered or certified mail, postage prepaid, return receipt requested, to the owner of the land on which the building or structure is located as such person's name and address appears on the last County equalized assessment roll, and to each mortgagee or beneficiary under any deed of trust,that is of record; to the holder of any lease that is of record, and to the record holder of any other estate or interest in the building or structure or the land upon which such building or structure is located, at the last known addresses of such interest holders. If the address of any such person is unknown, that fact shall be stated in the copy so mailed and it shall be addressed to the person at the county seat. Service by mail shall be deemed complete at the time of deposit in the mails. The Building Director shall file a copy of the Notice of Defects with the Clerk of the Board along with an affidavit certifying to the persons, date and manner in which such notice was given. He shall also thereafter file any receipt

cards which are returned to him acknowledging receipt of the notice. The failure of any owner or other person to receive such notice shall not affect in any manner the validity of any proceedings taken hereunder.

(d) Order to Vacate. Whenever, in the opinion of the Building Director, extreme and imminent hazard exists, he shall give written notice ordering the occupants of any such building to immediately vacate and, in the event compliance with the order is not voluntarily and promptly obtained, he shall request the law enforcement agency having jurisdiction to effect such a vacation or forthwith take such action at law as is required to cause the premises to be vacated. A copy of the Order to Vacate, which shall include the reasons for the order, shall be posted on the building and mailed to all concerned parties and filed with the Clerk of the Board in the same manner as the Notice of Defects. Upon giving such order to Vacate, the Building Director shall cause to be posted at each entrance to the building a notice to read: "DO NOT ENTER—UNSAFE TO OCCUPY, DIRECTOR OF BUILDING AND SAFETY, COUNTY OF RIVERSIDE", such notices shall remain posted until the

required repair, demolition or removal are completed. Such notice shall not be removed without written permission of the Building Director and no person shall enter the building except for the purpose of making the required repairs or the demolition of the building, without the written permission of the Building Director.

(e) Notice of Pendency of Proceeding. Whenever Notice of Defects has been given, the Building Director shall record in the Office of the County Recorder of Riverside County, a notice that an administrative proceeding has been commenced for the abatement of a public nuisance, describing the real property affected and stating that the costs incurred therein may become a lien on said property, and directing inquiry for further details to his office, giving the address thereof.

(f) Second Notice. If the order of the Building Director in the first notice shall not have been complied with within 45 days after giving notice, the Building Director shall give a second notice to all parties concerned by posting and mailing in the same manner as the first notice, which notice shall be entitled in letters not less

than three-fourths of an inch in height: "NOTICE TO ABATE NUISANCE". The notice shall direct the owner of the building or structure to appear at a hearing before the Board of Supervisors at a stated date, time and place to show cause why such building or structure should not be condemned as a nuisance and be abated as herein provided. The hearing shall be set not less than 15 days after the posting and mailing of the notice by the Building Director.

The Building Director shall file a copy of the notice and an affidavit of service with the clerk of the Board in the same manner as the first notice, but the failure of any owner or other person to receive such notice shall not affect in any manner the validity of any proceedings taken hereunder.

(g) Hearing. At the time fixed in the notice, the Board of Supervisors shall proceed to hear the testimony of the Building Director, and the owner of the building or structure or his representatives if present at said hearing, and other concerned parties who may desire to testify, regarding the condition of the building or structure, the estimated cost of reconstruction, repair or removal, and any other relevant matter.

Upon the conclusion of the hearing, the Board shall make its decision and, in the event that it so concludes, it may declare the building or structure to be a nuisance and direct the owner to abate the same by having the building or structure properly reconstructed or repaired, or by having it razed or removed, and further notifying the owner that if said nuisance is not abated within 30 days after posting and mailing of the Board's decision, the building or structure will be razed or removed by the County of Riverside and the expense thereof shall be a lien on the lot or parcel of land upon which the building or structure is located.

At any time within 10 days after the Board's decision directing the abatement of a nuisance, the Building Director shall post a copy of the Board's decision on the building or structure and mail copies thereof to all parties concerned in the same manner as the first notice, and he shall file an affidavit thereof with the Clerk of the Board. The Board may grant any extension of time to abate said nuisance that it may deem justifiable upon good cause being shown.

(h) Time to Bring Action. Unless the owner or holder of an interest of record brings an action in a court of competent jurisdiction within 30 days after the date of mailing and posting on said premises of the notice of the decision of the Board, contesting the validity of any proceedings leading up to and including the decision of the Board, all objections to the proceedings and decision will be deemed to have been waived.

(i) Jurisdiction to Abate. Thirty days after the mailing and posting of the Board's decision, the County shall have jurisdiction to abate such nuisance by razing or removing the building or structure, unless within the 30-day period an extension of time is granted by the Board. In the event that the nuisance is not abated within the prescribed time, the County may thereupon raze and remove the building or structure or have the same done under its direction and supervision.

(j) Sale of Materials. The building materials contained in such building or structure so razed or removed may be sold by the Building Director at

public sale to the highest responsible bidder after not less than five days notice of intended sale published at least once in a newspaper of general circulation published in the county either before or after a building or structure has been razed or removed, and any amount received from the sale of such materials shall be deducted from the expense of razing or removing the building or structure. The Building Director shall keep an itemized account of the expenses involved in the razing or removing and shall deduct therefrom any amount received from the sale of the building materials. If the Building Director determines that there will be no materials that are saleable, he shall not advertise for bids.

(k) Statement of Expense. The Building Director shall cause to be posted conspicuously on the property from which the building or structure was razed or removed, a verified statement showing the gross and net expense of the razing or removing and all other costs, together with a notice of the date, time and place when and where the statement shall be heard by the Board, which shall be not less than 5 days after the posting and

mailing of the statement. A copy of the statement and notice shall be mailed to all concerned parties in the manner as is prescribed for the first notice and filed with the Clerk of the Board together with an affidavit of posting and mailing.

(l) Hearing on Statement of Expense. At the time fixed for the hearing on the statement of expense the Board shall consider the statement, together with any objections or protests which may be raised by the property owner or other concerned parties. The Board may make any such revision, correction or modification in the statement as it may deem just, and thereafter shall render its decision on the statement. The Board's decision on the statement and all protests and objections which may be made shall be final and conclusive.

(m) Payment - Lien. If payment is not made within 10 days after the Board's decision on the statement, the Building Director shall transmit the statement and the Board's decision to the County Auditor who shall place the amount thereof on the assessment roll as a special assessment to be paid with

County taxes, unless sooner paid. At the same time, the Building Director shall file in the Office of the County Recorder of Riverside County a Notice of Lien, describing the real property affected, a summary of the action taken to abate the nuisance and the amount of the lien claimed by the County of Riverside.

(n) Release of Lien Upon payment in full of the costs of the abatement proceeding and the expense of the work done, or upon order of the Board of Supervisors, the Building Director shall execute and record with the County Recorder a release of the recorded lien on the property. If an assessment has been placed on the assessment roll and is thereafter paid to the Building Director, he shall notify the County Auditor who shall cancel the assessment on the roll.

(o) In the event that the amount received from a sale of materials exceeds the expenses of abatement, such excesses shall be deposited with the County Treasurer to the credit of the owner of the property or to such other person legally entitled thereto, and such excess shall be payable to the owner or other person upon producing

evidence of ownership satisfactory to the Treasurer.

(p) The Building Director is authorized to pay from funds appropriated to him the cost of a title search to determine who are the concerned parties, mailing expense and the expense of all work done or caused to be done by him in the repair, rehabilitation, demolition or removal of a building or structure under this action. All of such costs shall be included in the statement of expense filed by the Building Director.

(q) The Board may continue any hearing provided for herein from time to time. Upon the close of a hearing, the Board shall render its decision not later than 15 days thereafter.

(r) Other Remedies. Nothing herein shall preclude the use, by the County of Riverside or any person adversely affected, of any other remedy, civil, criminal or otherwise, for the abatement of a nuisance instead of or in addition to any of the provisions of this section.

4. The following paragraphs are added to Section 303(a) of the Uniform Building Code:

(1) Any person to whom a building permit is issued may on payment of a $5.00 fee, secure a permit for a tent or other temporary structure to be erected on the same premises and used for dwelling purposes pending the completion of the permanent building. Such permit shall be effective for a period of six months, renewable upon showing of necessity therefore. The permit is revocable unless construction of the permanent building is commenced within 30 days of issuance date of building permit and construction is continued with reasonable diligence.

If the permanent building to be erected is to replace or restore a previous building destroyed or made uninhabitable by fire or other casualty the permit for a tent or temporary structure may be issued without a building permit, but may not be renewed unless the building permit has been issued.

This ordinance is declared to be an urgency ordinance and shall take effect upon its adoption. The facts constituting the urgency are that people rendered homeless by recent fires need on site temporary housing pending receipt of insurance proceeds and preparation of plans to rebuild.

(2) Whenever a building for which a permit has been obtained changes ownership during the construction period, the new owner shall report such fact to Department of Building and Safety. A $5.00 fee shall be charged to transfer the required permits to the new owner.

MECHANICAL CODE

Section 4(a). The Uniform Mechanical Code, 1970 Edition (Uniform Building Code, Volume II), including the Appendix thereof and including the Standards therein, as adopted by the International Conference of Building Officials, is hereby adopted as a part of the Building Code of the County of Riverside and made a part of this Ordinance by reference (3 copies of which are on file for use

and examination by the public in the office of the County Clerk) with the following modifications: * * *

PLUMBING CODE

Section 5. The Uniform Plumbing Code, 1970 Edition, as adopted by the International Association of Plumbing and Mechanical Officials, is hereby adopted as the Plumbing Code of the County of Riverside and made a part of this ordinance by reference (3 copies of which are on file for use and examination by the public in the office of the County Clerk), with the following modifications: * * *

ELECTRICAL CODE

Section 6. The Uniform Wiring Code, 1968 Edition, as prepared and published by the Southern California Chapter of the International Association of Electrical Inspectors, is hereby adopted as the Electrical Code of the County of Riverside and made a part of this Ordinance by reference (three copies of which are on file for use and examination by the public in the office of the County Clerk), with the following modifications: * * *

MISCELLANEOUS

Section 7.

A. No one shall use as a place of habitation, residence or business any discarded, used, secondhand, salvaged, abandoned or replaced street car, box car, refrigerator car, motor bus body or similar vehicle body unless such structures are altered, changed or reconstructed so as to comply with all other conditions and requirements of this ordinance.

B. * * *

C. Nothing in this ordinance shall be construed as prohibiting any person from doing his own work nor from employing any person to work on a building or structure to which the provisions of this ordinance apply, provided there is compliance with Section 3800 of the California Labor Code. However, the reasonable value of such labor shall be included in the permit valuation.

D. Notwithstanding any of the provisions of this ordinance ex-

empting certain buildings or structures from its application, any person may submit an application for a permit to construct any building or structure otherwise exempted from the application of this ordinance provided, if said permit is issued with knowledge by the applicant that a permit is not required, the provisions of this ordinance shall thereafter apply to the said construction.

E. If after obtaining a permit and paying the fee or fees required by Section 4, permittee shall decide not to proceed thereunder, he may during the life of the permit apply in writing to the Building Director for a refund. If no excavation has been made or no construction has been commenced, the Building Director shall approve a refund equal to 50 per cent of the fee paid, and if prior to the application no plan checking has been required or performed, he shall approve

the refund for an additional 25 per cent of the original fee. The application for refund shall be made upon the usual form of claim against the County, and the action of the Building Director shall be endorsed thereon with a brief statement of the basis of refund and the amount approved for refund. In no event shall a refund exceed 75 per cent of the original fee or fees paid.

Subject to the foregoing limitations and in like manner, the portion of any such fees in excess of the estimated expense of the Building Director resulting from the issuance of the permit may, on his recommendation, with approval of the Board of Supervisors, be refunded in cases only where the property involved becomes a part of any city and the county government loses jurisdiction before building is completed. Whenever a portion of the fee or fees collected for a building permit is refunded, fees paid for

related plumbing and electrical permits may also be refunded if no work has been performed thereunder; if a portion of the work has been done, the portion of such fees in excess of the estimated expenses of the Building Director may be refunded.

F. All buildings being constructed in other than a subdivision, or so located as to not be readily identifiable as to definite location, shall have placed a legible sign bearing the name of the owner and permittee, together with the permit or registration number so that it can be read from the road, highway or ingress easement.

G. To facilitate and expedite the function of plan checking during periods of heavy workload, the Building Director may, at his discretion, employ local engineering firms or their facilities to check plans and specifications at the same fees that are allowed to the Department of Building and Safety.

PENALTY FOR VIOLATION

Section 9. Any person who violates any of the provisions of this ordinance, or who occupies any building relocated in violation of this ordinance, or who interferes with or obstructs the work of the Building Director, or his authorized representative, engaged in the work of inspecting any building, or of completing, demolishing or removing any building or structure, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than $500.00 or by imprisonment for not more than six months, or by both such fine and imprisonment.

SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
OCT 25 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974
No. 74-262

ELIZABETH RICCI,

Petitioner,

vs.

COUNTY OF RIVERSIDE; R. C. SMITH, Director, Department of Building and Safety for the County of Riverside; WILLIAM O. ALLEE, General Building Inspector for the County of Riverside,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS.

RAY T. SULLIVAN, JR.,
County Counsel,
County of Riverside,

STEVEN A. BROILES,
Deputy County Counsel,

300 Law Library Building,
3535 Tenth Street,
Riverside, Calif. 92501,
(714) 787-2421,

Attorneys for Respondents.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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IN THE

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ELIZABETH RICCI,

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COUNTY OF RIVERSIDE; R. C. SMITH, Director, Department of Building and Safety for the County of Riverside; WILLIAM O. ALLEE, General Building Inspector for the County of Riverside,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS.

Opinions Below.

This action was consolidated on appeal with two other cases.[1] The opinion of the United States Court of Appeals for the Ninth Circuit and dissenting opinion were filed on March 18, 1974 and are reported at 495 F.2d 1 (9th Cir. 1974). Petition for rehearing and suggestion for rehearing en banc was denied June 11,

[1] *Rincon Band of Mission Indians v. County of San Diego,* 324 F. Supp. 371 (S.D. Cal. 1971), *petition for cert. filed,* 43 U.S.L. Week. 3018 (U.S. July 15, 1974) (No. 73-2023); *Madrigal v. County of Riverside,* Civil No. 70-1893, C.D. Cal., Feb. 16, 1971.

1974. A copy of the order denying the petition is attached to Petitioner's brief and marked Appendix C. The opinion of the United States District Court, Central District of California, was filed August 3, 1971, and is unreported.[2] A copy of the opinion is attached hereto and marked Appendix A.

Jurisdiction.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1), and Rule 22 of the Rules of the Supreme Court of the United States. The order of the Court of Appeals for the Ninth Circuit denying the petition for rehearing was filed June 11, 1974, and the petition for certiorari was filed within 90 days of that date.

Questions Presented.

1. Is an appeal moot where the trial court restrains enforcement of a portion of an ordinance and no attempt is made to enforce the remaining provisions of the ordinance pending appeal?

2. Did the District Court have jurisdiction to hear the action?

Statutes Involved.

The relevant statutes and ordinances are set forth in Petitioner's brief and marked Appendix D. They are the following:

28 U.S.C. §1331;

28 U.S.C. §2201;

Riverside County, California, Ordinance No. 457, §4.

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[2]The action was consolidated for trial with *United States v. County of Riverside*, Civil No. 71-1297, C.D. Cal., Sept. 9, 1971, *appeal dismissed*, Dec. 29, 1971.

Statement of the Case.

This is an action brought by an Indian Allottee for injunctive and declaratory relief to prevent the enforcement of the Building Code of Riverside County (Ordinance No. 457) against her partially constructed dwelling located on Indian land held in trust by the United States of America.[3]

An action filed by the United States raising similar issues was consolidated for trial with this action. [Docket, Clerk's Record (R) 414; Reporter's Transcript (T) 81, line 21, to T. 82, line 1.] By prior stipulation of all parties to both actions, testimonial evidence was offered only by affidavit. [T. 82, lines 8-18.]

In February, 1971, Petitioner and her husband began construction of a house on her Indian allotment of land located within the Pechanga Indian Reservation. [Stipulation,[4] p. 3, lines 18-19; Affidavit of Elizabeth Ricci, R. 10, lines 14-15.] Construction of the dwelling was not sponsored, funded or supervised by the federal government. [T. 86, lines 12-16; T. 125, lines 10-13; Affidavit of George Ricci, R. 2, lines 9-12; Affidavit of Elizabeth Ricci, R. 9, lines 17-20.] Excluding their own labor, Petitioner and her husband spent $4,000 for materials in constructing the house. [Affidavit of Elizabeth Ricci, R. 10, lines 17-20.]

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[3]The trust exists pursuant to the provisions of the Mission Indian Relief Act of January 12, 1891, 26 Stat. 712.

[4]Pre-trial Stipulation as to Issues of Fact and Law, filed June 15, 1971 [Docket, R. 415]. The stipulation was not transmitted to the Court of Appeals as part of the record on appeal though designated for transmission. [R. 402.]

No application for the building permit was made to the County of Riverside as required by the Building Code.[5] [Stipulation, p. 3, lines 28-30.]

On April 16, 1971, when construction of the Petitioner's dwelling was almost complete, the fact that Petitioner was building a structure without a permit was brought to the attention of officials of Riverside County when the structure was discovered by Respondent Allee. [Affidavit of William O. Allee, R. 58, lines 27-31.] A notice was posted at the construction site ordering a cessation of construction under threat of criminal prosecution, for noncompliance with the Building Code. [Affidavit of William O. Allee, R. 58, line 32 to R. 59, line 3; Affidavit of George Ricci, Exhibit B, R. 7.]

On May 7, 1971, four days prior to filing the action in the District Court, Petitioner's husband was told that unless he obtained a building permit he would be criminally prosecuted. [Affidavit of George Ricci, R. 3, line 31, to R. 4, line 1; Affidavit of William O. Allee, R. 60, lines 4-9.]

In addition to failing to obtain a building permit, Petitioner failed to comply with the construction requirements of the Building Code.[6] Respondent Allee testified as to the provisions of the Uniform Plumbing

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[5]Riverside County Ordinance No. 457, §4, incorporates pursuant to authority given in Sections 50022.1 to 50022.8 of the California Government Code, certain provisions of the Uniform Building Code, Vol. 1 (1970 ed.) [Exhibit D]. The requirement for a building permit is found in Section 301 of the Uniform Building Code.

[6]Riverside County Ordinance No. 457 incorporates, pursuant to authority given in Sections 50022.1 to 50022.8 of the California Government Code, certain of the provisions of the Uniform Plumbing Code (1970 ed.) [Exhibit E.]

Code (1970 ed.) violated by Petitioner in constructing the dwelling:

> 1. Violation of §§401 and 503(a) in that the waste line and risers in the bathroom and the kitchen installed in the cement floor were constructed of galvanized pipe.
>
> 2. Violation of §1008(c) in that the domestic water lines installed in or under the cement slab were galvanized and not given a suitable protective coating.
>
> 3. A violation of §315(a) in that there was no protective material applied to the piping where it passed through the cement slab. [R. 59, lines 21-31.]

One of these code violations was acknowledged by Petitioner's expert. [Affidavit of Wally Niewadomski, R. 147, line 26, to R. 148, line 1.]

The failure to apply a protective coating to the domestic water lines in and under the cement slab will cause the pipe to corrode in from 5 years to 20 years. [Affidavit of LeRoy Bovey, R. 142, lines 19-21; Exhibit H; Affidavit of Wally Niewadomski, R. 148, lines 5-8.] The health implications of a piping failure due to external corrosion was testified to Kenneth A. Timm, the Technical Advisor to the International Association of Plumbing and Mechanical Officials, the organization that compiled the Uniform Plumbing Code:

> . . . A leak in a water line under or in a slab of a structure caused by corrosion would constitute a cross-connection and as such could contaminate not only the inhabitants of the structure, but other homes that had a common water supply as well as cause a structural failure due to soil instability.

A failure of the water piping system unless detected soon enough could cause a structural failure to the building by affecting the stability of the soil. A failure of the damage, waste and vent system could affect the health of the inhabitants by allowing sewage gas to enter the building. [R. 63, line 29, to R. 64, line 6.]

The judgment of the United States District Court, Honorable E. Avery Crary, Judge presiding, was entered September 9, 1971. [Docket, R. 416.] The judgment in material part reads:

* * *

1. That Defendants have jurisdiction over the allotment of Elizabeth Ricci, and the Pechanga Indian Reservation to enforce Riverside County Ordinance No. 457, regulating construction, even though the said allotment and the Pechanga Indian Reservation are owned in trust by the United States of America.

2. That a permanent injunction shall issue restraining Defendants, and each of them, from requiring Plaintiff Ricci, her agents or employees, to obtain a building permit for the continued construction of the existing dwelling on her trust allotment in the Pechanga Indian Reservation.

* * *

Argument.

The Appeal of a Judgment Restraining Enforcement of a Portion of an Ordinance Does Not Become Moot by Reason of Respondents' Failure to Enforce Other Ordinance Provisions Pending Appeal.

Respondents support Petitioner's application for a Writ of Certiorari. Although two issues are raised by the Petition for Writ of Certiorari, Respondents can add nothing to the argument of Petitioners with respect to the question of subject matter jurisdiction of the District Court. The following comments are concerned with the questions of whether justiciable controversy existed on appeal.

The question of whether or not this action presents an "actual controversy" under Article III of the Constitution and the Federal Declaratory Judgment Act, 28 U.S.C. §2201, was first raised on appeal by the United States in its brief *amicus curiae*. The United States argued that Petitioner's "immediate grievance" related to her ability to construct her house "free of county control", and because the District Court restrained Respondents from requiring Petitioner to obtain a building permit ". . . the question of Riverside County's powers to regulate other construction on Elizabeth Ricci's trust allotment is 'purely artificial and hypothetical' on the present record, and, therefore, moot in this case at this time." [Brief of United States as *Amicus Curiae*, p. 4.]

The Court of Appeals, quoting from *California v. San Pablo & T. R. R.*, 149 U.S. 308 (1893), dismissed the appeal as moot based upon the argument of *amicus* and for the further reason that Respondents had not undertaken any action against Peti-

tioner for violation of the Building Code while the appeal was pending.

> More than three years have gone by, and we have not been advised that any prosecution has been instituted by the County against Mrs. Ricci for any violations of the Building Code. We hold that whatever threat there was of prosecution because of other possible violations of the Building Code does not create a substantial controversy of sufficient immediacy and reality to warrant consideration of that part of the judgment below declaring the Riverside County Building Code applied to the Plaintiff and the Pechanga Indian Reservation. See our discussion in *Rincon, supra,* pp. 5-6. Mrs. Ricci's appeal, therefore, is dismissed as moot. Having arrived at that conclusion, "we are precluded from considering any other issues presented for review" (Blackmun, J., concurring in *O'Shea v. Littleton, supra,* ..... U.S. at ....., 94 S. Ct. at 680. (495 F.2d at 7].)

The conclusion of the Court of Appeals can be sustained only if Petitioner became "free of county control" by being relieved of the requirement of obtaining a building permit, and if a declaratory judgment upholding a County ordinance becomes moot if action to enforce the ordinance is not taken during pendency of an appeal of the judgment.

The Building Code of Riverside County requires persons constructing a structure of the type the Petitioner constructed, to obtain a building permit and meet certain standards in terms of materials and methods to be used in construction. Petitioner sought an injunction against enforcement of the entire Building

Code against her and her dwelling, and a declaration as to the Respondents' jurisdiction to apply the terms of the Building Code within the Pechanga Indian Reservation. [R. 43, lines 15-25.] Contrary to the characterization in the majority opinion of the Court of Appeals [495 F.2d at 6.], the Petitioner's complaint for injunctive relief was not limited to restraining Respondents from enforcing only that portion of the Building Code requiring a building permit. The complaint specifically alleged that Petitioner had neither the money nor the time to make the structural changes to her dwelling in order to comply with the Building Code, prior to the date she was to vacate her old home and move into the structure under construction. [Complaint, R. 41, lines 6-19.]

The judgment of the District Court restrained Respondents from enforcing against Petitioner only that portion of the Building Code requiring a building permit and only as to the then current construction of the dwelling. The District Court did not restrain enforcement of any other part of the Building Code, including the construction requirements, against Petitioner, or her dwelling, or enforcement of the permit requirement against any possible future construction work on her dwelling. Therefore Petitioner did not gain the full measure of "freedom from county control" she requested. Consistent with the judgment of the District Court, Respondents have the options of bringing a civil action to compel Petitioner to vacate the premises or comply with the construction standards of the Building Code; a criminal action for violation of the construction standards (Riverside County, California, Ordinance No. 457, §9 [Exhibit A]); or waiting until portions of the plumbing system corrode and then mov-

ing to abate the structure as a health hazard. *City of Bakersfield v. Miller*, 64 Cal.2d 93, 48 Cal.Rptr. 889, 410 P.2d 393 (1966); Riverside County, California, Ordinance No. 457, §4(a) and (2.1) [Exhibit A].

The Court of Appeals also relied upon Respondents' inaction in prosecuting Petitioner after entry of the District Court judgment, for violation of the Building Code standards of construction, in holding that the appeal had become moot. In reaching this conclusion, the Court of Appeals cited [495 F.2d at 7] and apparently relied upon the authorities discussed in the portion of its opinion related to the companion case of *Rincon Band of Mission Indians v. County of San Diego*. These authorities relate to the requirement of substantiality, immediacy, and reality of a threat of enforcement necessary to maintain an action for declaratory relief on the question of the legality of a statute.

There would appear to be no basis in the record to question the substantiality, immediacy, and reality of the written and oral threats given Petition and her husband of prosecution for violation of the Building Code. [Affidavit of William O. Allee, R. 58 to R. 60; Affidavit of George Ricci, R. 3 to R. 4 and Exhibit B, R. 7.] See *Steffel v. Thompson*, ... U.S. ...., 94 S.Ct. 1209 (1974). Unless the Court of Appeals is adding a further requirement that a threat to enforce a statute specify the precise grounds of alleged violation in order to be substantial, immediate and real, it would appear that the test of justiciability announced in *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941), has been met.

An actual controversy must appear at every stage of review, however, not merely at the time the complaint

is filed. *Roe v. Wade*, 410 U.S. 113, 125 (1973); *S. E. C. v. Medical Comm. for Human Rights*, 404 U.S. 403 (1972). The Court of Appeals apparently concluded that the failure of Respondents to take enforcement action agaist Petitioner during the pendency of the appeal, removed or vitiated the earlier threat to enforce the provisions of the Building Code.

Ordinarily, voluntary cessation of conduct complained of will not render a case moot. In *United States v. Concentrated Phosphate Export Association*, 393 U.S. 199 (1968), this Court held that on the particular facts of the case an action to enjoin alleged violation of the Sherman Act by a trade association was not technically moot merely because during the course of litigation the association was dissolved and a new federal agency regulation made it uneconomical for an association to continue. The Court's opinion states:

> The test for mootness in cases such as this is a stringent one. Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave "[t]he defendant . . . free to return to his old ways." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953); see *e.g.*, *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290 (1897). A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. But here we have only appellees' own statement that it would be uneconomical for them to engage in any further joint operations. Such a statement, standing alone, cannot suffice to satisfy the heavy burden of persuasion which we have

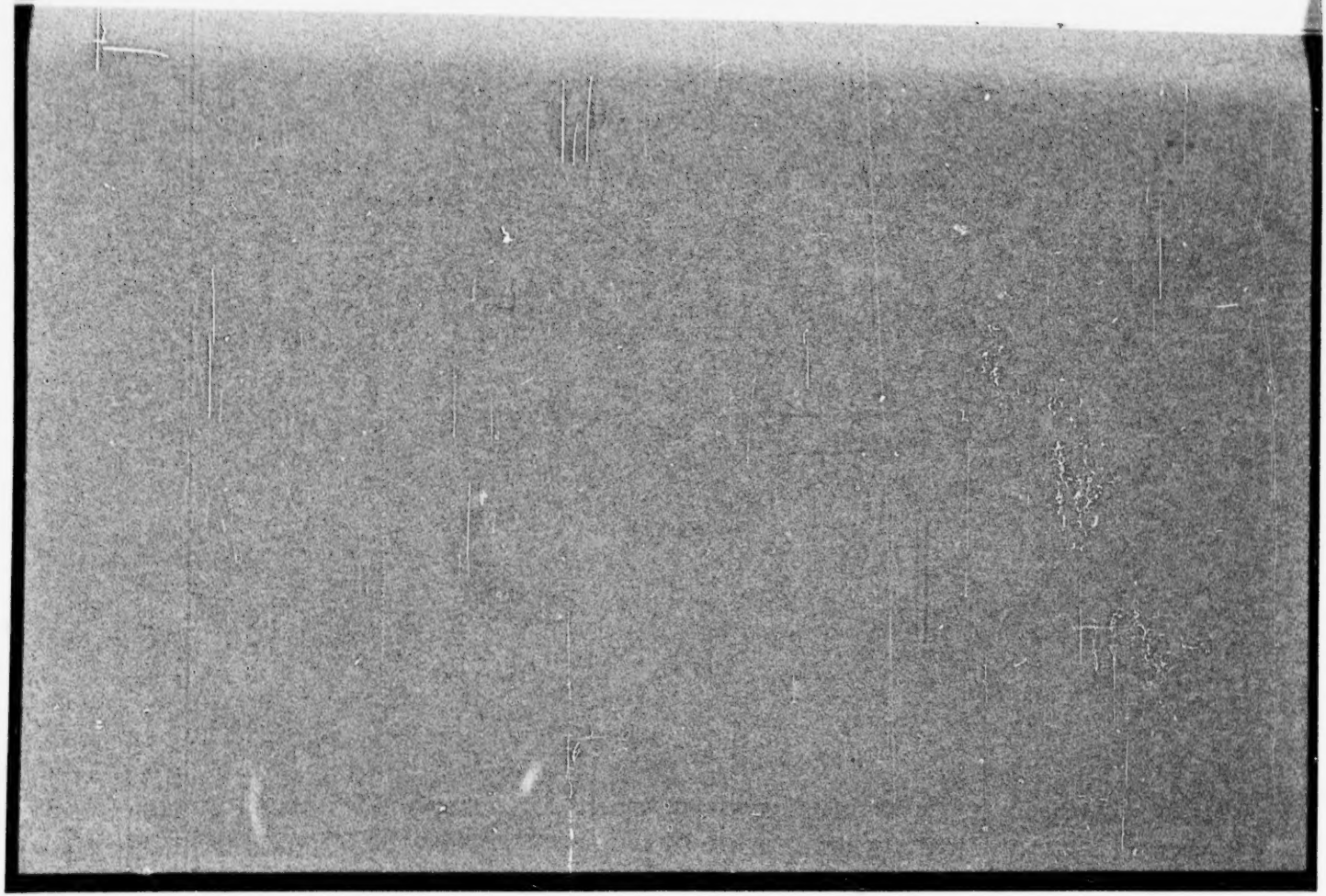
> held rests upon those in appellees' shoes. *United States v. W. T. Grant Co.*, 345 U.S. at 633. . . . [393 U.S. at 203.]

There are no "subsequent events", other than Respondents' inaction, noted in the opinion of the Court of Appeals, that make it absolutely clear that Respondents will not continue to enforce the Building Code against Petitioner and within the Pechanga Indian Reservation. Factually, the issue must arise again. There is no question that a portion of Petitioner's plumbing system will corrode sometime in the future. At that time she will have to obtain a building permit to effect the needed repairs [Uniform Plumbing Code (1970 ed.) §1.8] or forego the repairs and await abatement proceedings by the Respondents.

Conclusion.

Petitioner's Petition for Writ of Certiorari should be granted.

RAY T. SULLIVAN, JR.,
County Counsel,
County of Riverside,
STEVEN A. BROILES,
Deputy County Counsel,
Attorneys for Respondents.



APPENDIX A.

Memorandum for Use in Preparation of Proposed Findings of Fact and Conclusions of Law, and Judgment.

United States District Court, Central District of California.

Elizabeth Ricci, Plaintiff, vs. County of Riverside; R. C. Smith, Director, Department of Building and Safety; and William O. Allee, General Building Inspector for the County of Riverside, Defendants. No. 71-1134-EC.

United States of America, Plaintiff, vs. County of Riverside; R. C. Smith, Director of the Riverside County Department of Building and Safety; and William O. Allee, General Building Inspector for the County of Riverside, Defendants. No. 71-1297-EC.

Filed: Aug. 3, 1971.

The first of the above entitled actions was filed on May 11, 1971. The Government filed its suit, a companion case, on May 28, 1971, and the two cases have been consolidated for trial.

Both suits seek to enjoin the enforcement of Riverside County Ordinance No. 457 (Deft's Ex. A) on Trust Land in the Pechanga Indian Reservation, which has been allotted to the plaintiff Ricci, and on Indian Trust Land generally.

By stipulation of all parties, the only evidence adduced at the trial of the case in chief was by way of affidavits. It was further agreed that the exhibits to the pleadings and affidavits are to be deemed exhibits in

evidence, in addition to the exhibits introduced at the time of trial. The testimony taken at the hearing of the motion for preliminary injunction is also evidence in the cases considered herein.

RICCI vs. COUNTY OF RIVERSIDE, ET AL.

Plaintiff Ricci seeks an injunction against the County of Riverside from enforcement of its Ordinance 457, Uniform Building Code, (Deft's Ex. A) on plaintiff's allotted Indian Trust located on the Pechanga Indian Reservation in Riverside County. The Pechanga Tribe is not a chartered Federal corporation with powers to manage the affairs of its members. A dwelling being constructed by plaintiff and her husband on her allotted property was nearly completed when she was notified by Riverside County authorities of the requirements of Riverside County Ordinance No. 457, adopted in 1959, that a permit be obtained for such construction and that she must obtain such permit or face criminal prosecution.

It is conceded by Plaintiff that the house does not comply with the County Building Code, a part of Ordinance 457, but is urged that neither the Ordinance nor the County Building Code may be enforced on Indian Trust Property. Permission to construct the dwelling was granted by the Pechanga Indian Tribal Council. The plaintiff also relied on a letter to Mr. Frank McGee, an Indian neighbor of plaintiff, signed by Mr. R. C. Hampton as Senior Building Inspector of Riverside County Department of Building and Safety, which stated that buildings constructed on Indian reservations were exempt from building permit requirements (Ex. A to Affidavit of George Ricci), and two letter opinions, one of the Solicitor, Department of Interior,

and one of the Regional Solicitor, both written in 1969 (Exs. C and D to the Complaint).

The issues presented in the Ricci case are: (1) Whether Riverside County Ordinance No. 457 is enforceable on Indian Trust Land in the Pechanga Indian Reservation and (2) Assuming the Ordinance to be enforceable on the Trust Land, whether the County of Riverside may, in the circumstances, enforce the Ordinance against plaintiff.

Riverside County urges that the Ordinance is a police power regulation related to the protection of public health and safety and was adopted under the authority of Article XI, Section 7, of the California Constitution:

> "A County or City may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."

Ordinance 457 adopts certain provisions of uniform codes, as specified therein, including building, plumbing and electrical codes, as authorized by Sections 50022.1 to 50022.8 of the California Government Code.

The counties in California are required to comply with the State legislation on health and safety as provided in California Health and Safety Code, Section 17958.

One of the defects in the plaintiff's dwelling is the failure to comply with the plumbing requirements in Ordinance 457.

Ordinance 457 as it Relates to Public Law 280

Public Law 280 was enacted August 15, 1953, c. 505 § 4, 67 Stat. 589, and amended in 1954 and

1958. It is codified in Title 18 U.S.C. § 1162[1] and Title 28 U.S.C. § 1360.[2] The law removed the Indians in certain states, including California, from the exclusive jurisdiction of the Federal Government (Department of Interior) and extended to Indian Reservations

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[1]§1162. State jurisdiction over offenses committed by or against Indians in the Indian country.

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian country affected
* * *	* * *
California	All Indian country within the State
* * *	* * *

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section. Added Aug. 15, 1953, c. 505, § 2, 67 Stat. 588, and amended Aug. 24, 1954, c. 910, § 1, 68 Stat. 795; Aug. 8, 1958, Pub.L. 85-615, § 1, 72 Stat. 545.

[2]§1360. State civil jurisdiction in actions to which Indians are parties.

(a) Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Terri-

and the Indian allottees of Indian Trust Lands, the substantive civil laws of the respective states insofar as their laws were of general application to private persons or private property. With certain limitations, the Act also extended the laws of the specified states to real and personal property belonging to an Indian or Indian Tribe that was held in trust by the United States.

In passing Public Law 280, Congress observed that the extension of State laws to Indians and Indian reservations was "deemed desirable." In the legislative history, as reported in H. Rept. No. 848, 83rd Cong.,

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tory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian country affected
* * *	* * *
California	All Indian country within the State
* * *	* * *

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section. Added Aug. 15, 1953, c. 505, § 4, 67 Stat. 589, amended Aug. 24, 1954, c. 910, § 2, 68 Stat. 795; Aug. 8, 1958, Pub.L. 85-615, §2, 72 Stat. 545.

1st Sess. (1953), adopted verbatim in S. Rept. No. 699, 83rd Cong., 1st Sess. (1953), the following comment appears:

> "Similarly, the Indians of several States have reached a stage of acculturation and development that makes desirable extension of State civil jurisdiction to the Indian country within their borders. Permitting the State courts to adjudicate civil controversies arising on Indian reservations, and to extend to those reservations the substantive civil laws of the respective States insofar as those laws are of general application to private persons or private property, is deemed desirable."

Section 1360 of Title 28, U.S.C., as noted above, codifies Public Law 280 with respect to State civil jurisdiction.

Paragraph (a) of the Section concerns State jurisdiction of civil actions to which Indians are parties and the applicability of the civil laws of such State that are of general application to private persons and private property within Indian country.

Paragraph (b) of Section 1360 provides, in part, that nothing in the Section shall authorize the alienation or encumbrance of any real or personal property belonging to any Indian or Indian Tribes *that is held in trust* by the United States "* * * or shall authorize regulation of the use of *such property* in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; * * *." [Emphasis added.]

Paragraph (c) of the Section provides that Tribal ordinances or customs of an Indian Tribe in the exercise of any authority it may possess shall "* * * if not

inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this Section."

Section 1162 of Title 18, U.S.C., codifies Public Law 280 with respect to jurisdiction of criminal offenses committed by or against Indians in Indian country within the State and the applicability of criminal laws of such State within such Indian country.

County Ordinance 457 is a law of the State of California of general application within the meaning of the statutes. Article XI, Section 7, California Constitution, supra; Restatement of the Law—Conflicts of Law, Section 2(b).[3]

Applying the provisions of the statutes to this case, two questions are to be answered: (a) Does Riverside County Ordinance No. 457 impose an *encumbrance* on the plaintiff's real property? (b) Does the Ordinance constitute a regulation of the *use* of such property in a manner inconsistent with any Federal treaty or statute?

The plaintiff relies in chief on an opinion of the Solicitor, Department of Interior, dated February 7, 1969, and on an opinion of the Regional Solicitor dated March 27, 1969 (Exs. C and D to Complaint), together with *Snohomish County vs. Seattle Disposal Co.*, 70 Wash. 2d 668, 425 P.2d 22 (1967), Cert. den. 389 U.S. 1016 (1967); and *Warren Trading Post*

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[3]The Restatement of Conflicts, § 2b:

The body of law of a state is not necessarily applicable equally to all persons or places within the state. Thus, different classes of persons or different localities may be governed by different laws, or local subdivisions of the state may be allowed by the state to make laws applicable in some particulars within their own boundaries. All such laws, however, form a portion of the law of the state.

Company vs. Arizona Tax Commission, 380 U.S. 685, (1965). Violation of the due process clause of the United States Constitution is also alleged by plaintiff based on the asserted vagueness of the statute and the arbitrary interference with plaintiff's right by the enforcement of Ordinance 457.

The opinions of the Solicitor, Department of Interior, and the Regional Solicitor, written after Public Law 280 became effective, are stated in two letters dated February 7, 1969, and March 27, 1969, supra. These letter opinions concern California health and sanitation laws (Exhibit C) and California grazing and fencing laws (Exhibit D). The Solicitor discusses pertinent cases and statutes, including Section 231, Title 25, U.S.C., and states the position of the Department of the Interior to be as follows:

> "Generally, it is the position of this Department that Public Law 280 invests the states, which were granted or have assumed jurisdiction thereunder, with civil and criminal jurisdiction over the persons and private (non-trust) property of Indians within the Indian country." [Exhibit C, page 1.]

He relies, in chief, on *Snohomish County vs. Seattle Disposal Co.,* 425 P.2d 22 (Wash. 1967), supra; and Dept. of the Interior Regulation, 25 C.F.R. 1.4, and in concluding his letter of February 7, 1969, he says:

> "Our conclusion is that Public Law 280 invests the State of California with jurisdiction to enforce its health and sanitation laws and regulations against the person of Indians in the Indian country

> but does not authorize the State, directly or indirectly, to enforce such laws against property held in trust by the United States for the benefit of Indians."

The plaintiff Ricci and the Government agree that Section 1.4, 25 C.F.R., is not applicable to the within cases by reason of the fact it concerns *leased* Indian Trust Land.

In the *Snohomish* case, supra, the defendant Seattle Disposal Company leased allotted Indian land, one parcel of which was Trust Land, for use as a sanitary land-fill garbage and refuse disposal site. The lease was authorized by the Tulalip Indian Tribes (Tribes) under their Tribal Ordinance No. 29. The Tribes were organized as a Federal corporation pursuant to the Indian Reorganization Act, 25 U.S.C. § 477.

Under Snohomish County zoning Ordinance No. 7, a conditional use permit was required to carry on garbage disposal operations except on land exempt from county regulation.

The Tribes, as Intervenor, and the defendant Company moved for summary judgment on the grounds the Court lacked jurisdiction of the subject matter. The Court granted the motion, holding that the State and its governmental agencies had no jurisdiction over *use* of the land in question and the zoning Ordinance No. 7 did constitute an *encumbrance* in violation of 28 U.S.C. 1360, and that the Tribes had the power, to the exclusion of the county or state, to regulate the use of the land in question and had done so by adopting Ordi-

nance 29. The County appealed and the Supreme Court of Washington held that the Tribes and property involved were not within the grant of State jurisdiction as provided in 28 U.S.C. 1360. [Pp. 25-26, opinion.] As authority for holding the zoning ordinance to be an *encumbrance*, the Washington court states, at page 26 of its opinion:

> "This court has said in the past that any 'burden upon land depreciative of its value, such as a lien, easement, or servitude, which, though adverse to the interest of the landowner, does not conflict with his conveyance of the land in fee' constitutes an encumbrance. Hebb v. Severson, 32 Wash. 2d 159, 167, 201 P.2d 156, 160 (1948). The application of the zoning ordinance to prohibit or limit the use of this land for commercial purposes certainly could be considered to diminish its value."

Judge Hale, in dissenting, urges that the zoning laws are not encumbrances but rather an exercise of police power to foster public welfare, health and safety. The Judge also points out that although zoning does impair the use of the land that zoning laws have never been held to be an encumbrance on real estate, as that term is contemplated under applicable law, but are exercised as police power of the governing authority. He cites and discusses several authorities on this point at page 28 of the opinion.

It appears to this Court that Ordinance 457 here involved does not constitute an encumbrance on the land involved even within the definition of that term as stated by the majority in the Snohomish case, since building ordinances are not generally considered to be a burden upon land depreciative of its value, such as a lien, easement, or servitude. *Lohmeyer vs. Bower*, 227 P.2d 102 (Kan. 1951).

Plaintiff's reliance on *Warren Trading Post Co. vs. Arizona Tax Commissioner*, 380 U.S. 685 (1965), does not appear to be well founded. It is to be noted that the State of Arizona is not one of those listed in Public Law 280.

The *Warren* case involved the right of Arizona to levy income tax on the appellant who was the operator of a Trading Post on the Navajo Indian Reservation under license from the Commission of Indian Affairs. The United States Supreme Court held that since Congress had broadly occupied the field of trading with Indians on reservations by all-inclusive regulations and statutes the State could not impose additional burden on the Indians or traders.

In marked contrast, Congress has not occupied the field involved in the case at bar by prescribing any legislation providing for the regulation of building construction on allotted lands. On the contrary, by Public Law 280, Congress has, with specified limitations, made specific legislative provisions for the exercise of civil as well as criminal jurisdiction by California over Indians and their property, *including trust lands.*

The California District Court of Appeal, in *People vs. Rhoades*, 12 C.A. 3rd 720, 90 Cal. Rptr. 794, considered the enforcement of Section 4291 of the California Public Resources Code which required the maintenance of a firebreak around buildings under specified conditions. Section 4021 of California Public Resources Code makes the violation of Section 4291, supra, a misdemeanor. Defendant, an Indian, was convicted in Justice Court for violation of Section 4021.

The premises involved were Indian Trust Lands. The District Court of Appeal, in reversing the judg-

ment of the Superior Court, which Court had reversed the conviction of the defendant Rhoades in the Justice Court, held that the State statute did not constitute an encumbrance on the land involved within the provisions of Public Law 280 (18 U.S.C. 1162) and that Section 4291 was a valid exercise of police power by the State. The Court discusses, in its opinion, the *Snohomish* case, supra, at some length (p. 797), and in ruling that Section 4291 did not constitute an encumbrance on the defendant's land under the definition of the Court in the *Snohomish* case, stated:

> "As we view it, it would not be a burden upon Rhoades' land 'depreciative of its value' to require that it be so maintained as not to be a hazard to forest lands in general and to Rhoades' lands in particular. We prefer the more common sense approach of dissenting Judge Hale and the other dissenting judges in Snohomish. The dissenting opinion says (on pp. 27-28): 'The broad general meaning employed by the majority * * * is not called for by the statute. The term "encumbrance" should be given its more * * * precise meaning—one denoting a burden on the land and affecting the title thereto or one impairing the power of alienation such as a mortgage, lien, easement, lease, or other disability to fee ownership.' In short, this court takes the position that by 'encumbrance' Congress intended to protect the Indian against his own profligacy—against those who throughout history have exploited the Indian. And we direct attention to the fact that in Public Law 280 the word 'encumbrance' (in the restrictive sentence referred to above) is used in the same series as the word 'alienation.' "

Insofar as concerns the issue of whether Ordinance 457 constitutes an encumbrance on plaintiff's land, this Court concludes that Congress intended no expanded definition of the meaning of the word as used in Public Law 280 beyond its usual interpretation, that is, a burden on the land which may impair the alienability of the fee, such as a mortgage, lien, or easement. *People vs. Rhoades,* supra; *Rincon Band of Mission Indians vs. County of San Diego,* 324 F. Supp. 371, 376, U.S.D.C. S.D. Cal., March 17, 1971. The Rincon case, supra, involved a San Diego County ordinance prohibiting the letting or use of Rincon Indian Reservation land for gambling purposes. In discussing "encumbrance", the Court said:

> "Whatever the term encumbrance denotes in Washington law, this court finds no warrant for expanding the definition of encumbrance as that term appears in Public Law 280 beyond its usual application indicating a burden on the land imposed by third persons which may impair alienability of the fee, such as a mortgage, lien, or easement. See Snohomish County v. Seattle Disposal Company, 70 Wash.2d 668, 674, 425 P.2d 22, 28 (1967) (Dissenting Opinion). Cf. Kirkwood v. Arenas, 243 F.2d 863, 867 (9th Cir. 1957).
>
> "[6, 7] The use of the word encumbrance in series with 'alienation' and 'taxation' indicates that Congress intended by these three words to protect the Indian from himself and swindlers, to prevent the taking of his lands by artifice or by law. Compare this language with similar terms employed for the same purpose in the Mission Indian Relief Act and the General Allotment Act,

discussed in Kirkwood v. Arenas, *supra* at 866. Later in the same statute it is provided that nothing in the section 'shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto.' 18 U.S.C. § 1162 (b). If all state laws regulating land use were made inapplicable by the earlier language describing encumbrances, then this language would be totally unneeded. In construing a statute, courts whenever possible avoid a construction which renders part of the statute superfluous. Consolidated Flower Shipments, Inc., Bay Area v. Civil Aeronautics Board, 205 F.2d 449 (9th Cir. 1953)."

Building ordinances, although they may be said to technically interfere with the *use* of land, have not been deemed to be encumbrances on the land and are lawful means of fostering the general welfare and contributing to the public health and safety under the police power. The provisions of Section 1360(b), Title 28, U.S.C., supra, preclude the laws of a State from the "regulation of the use" of the property here involved "in a manner inconsistent with any Federal * * * statute or with any regulation made pursuant thereto; * * *." Assuming, arguendo, that Ordinance 457 constitutes a technical regulation of the use of plaintiff's land, the Court concludes it is not such a regulation of use contemplated by the statute or intended by Congress, and, furthermore, not a regulation of use inconsistent with any Federal statute or *valid* regulation made pursuant thereto.

By virtue of the authority vested in the State of California by Public Law 280, State law may regulate the

use of Indian Trust Property if such regulation is not inconsistent with, in our case, a Federal statute or valid regulation issued pursuant thereto.

The United States, in its case, cites Federal acts and statutes, discussed infra, which, it contends, are inconsistent with Ordinance 457.

Although the Government may, of course, at any time, by way of statute, ordinance, or otherwise preempt the field of regulating the construction of buildings on Indian reservations, Congress has not seen fit to do so other than in certain Government projects financed and controlled through Government agencies referred to hereinafter. As noted above, Congress has, on the contrary, by Public Law 280, vested certain states with limited jurisdiction in the area of the law which includes this field generally. Until Congress sees fit to enact legislation which would preempt the field or the field be preempted by a valid regulation issued pursuant to a Federal statute, the Court concludes that the Government has not preempted the field and that Ordinance 457 is enforceable on the Pechanga Indian Reservation, including the Trust Land allotted to plaintiff herein, unless the County is, in the circumstances, precluded from enforcing the Ordinance as to the particular dwelling now completed on plaintiff's property by reason of her rights to due process.

On the issue of preemption, the United States Supreme Court, in *Head vs. New Mexico Board of Examiners* in Optometry, 374 U.S. 424 (1963), states:

> "In dealing with the contention that New Mexico's jurisdiction to regulate radio advertising has been preempted by the Federal Communications Act, we may begin by noting that the validity

> of this claim cannot be judged by reference to broad statements about the 'comprehensive' nature of federal regulation under the Federal Communications Act.[6] [T]he "question whether Congress and its commissions acting under it have so far exercised the exclusive jurisdiction that belongs to it as to exclude the State, must be answered by a judgment upon the particular case." Statements concerning the "exclusive jurisdiction" of Congress beg the only controversial question: whether Congress intended to make its jurisdiction exclusive.' *California v. Zook*, 336 U.S. 725, 731. *Kelly v. Washington*, 302 U.S. 1, 10-13. In areas of the law not inherently requiring national uniformity, our decisions are clear in requiring that state statutes, otherwise valid, must be upheld unless there is found 'such actual conflict between the two schemes of regulation that both cannot stand in the same area, [or] evidence of a congressional design to preempt the field.' *Florida Avocado Growers v. Paul*, 373 U.S. 132, 141."

Concerning plaintiff's right to due process of law and the question of whether those rights have been violated in the circumstances, the Court concludes that plaintiff Ricci is a ward of the Government and that she made every reasonable effort to build her home in accordance with the laws and regulations she had reason to believe, from sources of information normally available to her, were applicable. She had good reason to conclude from the information at hand, on which she had the right to rely, that she was not required to obtain a County building permit to build her house, and the Court concludes she may not be held to have

reasonably anticipated the Ordinance applied to her home on Indian Trust Land.

The plaintiff's house was nearly completed when the County authorities advised her of the need for obtaining a building permit under Ordinance 457. This was the first time the County had sought to enforce the 18 year old Ordinance on the Pechanga Reservation.

Having in mind all of the facts and circumstances as disclosed by the evidence introduced at the hearing on the motion for preliminary injunction and the many affidavits and exhibits offered by stipulation at the trial in chief, the Court concludes that the plaintiff's constitutional rights to due process were violated by the County of Riverside in requiring that she obtain a building permit for her nearly completed home.

Without going into detail, suffice it to say, there a great deal of confusion and conflicting opinions, as indicated by the evidence, on the part of Federal, State and County authorities, and the Pechanga Tribe, as to the proper interpretation of Public Law 280 with respect to the necessity of Indians occupying Trust Property to conform to certain County building ordinances.

UNITED STATES vs. COUNTY OF RIVERSIDE, et al.

The United States, by its action No. 71-1297-EC, also seeks an injunction against the enforcement of the Riverside Ordinance No. 457. The Government states the issue to be "whether Ordinance 457 is applicable to the Trust Lands in the Pechanga Indian Reservation."

The Government asserts that Ordinance 457 is in violation of Public Law 280 by reason of the Ordi-

nance being inconsistent with the following Federal acts and statutes:

(1) 1891 Mission Indian Relief Act.

(2) Title 42, U.S.C. §§ 2003 and 2004(a).

(3) Title 42, U.S.C. § 1589c.

The other contentions of the United States involving restrictions on the use and encumbrance of Indian Trust Properties conform substantially to the contentions of the plaintiff Ricci.

Referring to the Mission Indian Relief Act of 1891, it is to be noted that this Act was enacted long before Public Law 280 and that Public Law 280 obviously extends the laws of California, with certain limitation, to Indians and their property, including Trust Lands, and to the extent State laws are so extended, which is substantial, Public Law 280 would serve to amend prior declarations by Congress of Government authority in this field.

The case of *United States vs. Rickert,* 188 U.S. 432 (1903), so strongly relied on by plaintiffs in their discussion of "encumbrance", does not preclude the enforcement of Ordinance 457. The Supreme Court, in 1903, held that States could not levy taxes on lands allotted to Indians, nor the permanent improvements thereon, nor on personal property used by the Indians and obtained from the United States. To the same effect is *Kirkwood vs. Arenas,* 243 F.2d 863 (9 C.A. 1957).

Not only does the right to tax include the right to confiscate for nonpayment thereof, obviously an encumbrance, but Public Law 280 (Title 28, U.S.C. § 1360(b)) specifically excludes the states' right to tax any Indian Trust Property or personal property.

Referring to Sections 2003 and 2004(a), Title 42, U.S.C., supra, these sections do not appear to be inconsistent with Ordinance 457 nor do they preempt the field of required standards for the building of dwellings on Indian Trust Property.

The plaintiffs agree that the Secretary of Health, Education and Welfare (HEW) has *not* issued any regulations within the authority vested by the provisions of Section 2003.

Section 2004(a) refers to the construction of sanitation facilities by the Surgeon General. This Section concerns sanitation facilities including water supplies, sewage and waste disposal facilities, with appurtenances and fixtures for the use of same by Indian homes.

The affidavit of Raymond E. Johnson, Senior Sanitation Engineer, Indian Health Service, Riverside Field Office of the United States Department of HEW, concerns Government projects under Section 2004(a), supra, and he states, among other things, on page 3 of his affidavit that the sewage facilities which will be installed by the Government on the Pechanga Reservation "* * * will conform to the standards of local codes." The defendants agree that Ordinance 457 is in no wise controlling as to Government projects on Indian Reservations.

Mr. Marcoe, Supervisory Construction Representative for the Riverside Field Office of the United States Department of the Interior, Bureau of Indian Affairs, states in his affidavit that he is in charge of housing projects undertaken by the Bureau of Indian Affairs in conjunction with other Federal agencies, such as the Department of Housing and Urban Development (HUD). He oversees projects on Indian Reservations

in California which have been authorized under the Housing Improvement Program (HIP) of the Bureau of Indian Affairs. These are Government financed and controlled projects and, of course, are not subject to State laws.

Every effort should be made to improve the lot of the Indian, including his housing, within the framework of the laws enacted by Congress for his benefit. However, it does not appear that it would be to the Indian's best interest, or within the contemplation of Congress, to allow the Indian Trust Property to be developed in a manner which would result in unsanitary or unhealthy conditions. In the absence of Government control for housing construction generally, such undesirable conditions would readily develop in the construction of dwellings not a part of a Government project.

Neither plaintiff asserts that Ordinance 457 is unreasonable in its requirements, but only that it is not enforceable.

Title 42, U.S.C. § 1589(c),[4] supra, cited by plaintiff, authorizes the Secretary of Interior to convey surplus housing to members of Indian Tribes in certain counties of California, free of charge.

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[4] § 1589c. Transfer of certain housing to Indians

Upon a certification by the Secretary of the Interior that any surplus housing, classified by the Administrator as demountable, in the area of San Diego, California, is needed to provide dwelling accommodations for members of a tribe of Indians in Riverside County or San Diego County or Imperial County, California, the Administrator is authorized, notwithstanding any other provision of law, to transfer and convey such housing without consideration to such tribe, the members thereof, or the Secretary of the Interior in trust therefor, as the Secretary may prescribe: *Provided*, That the term housing as used in this section shall not include land.

Oct. 14, 1940, c. 862, Title VI, § 613, as added Aug. 2, 1954, c. 649, Title VIII, § 805(3), 68 Stat. 645.

Mr. Leonard M. Hill, Area Director, Bureau of Indian Affairs, Sacramento, California, addressed a memorandum dated October 15, 1954 (Ex. A, Affidavit of Sullivan, filed June 29, 1971), to "Governing Bodies and Members of Indian Bands in San Diego, Riverside and Imperial Counties." The memorandum concerned Federal surplus housing made available to Indians in those counties and stated, among other things, that "under existing laws, the counties and states have authority to enforce, and have stated that they will enforce, applicable building codes on Indian lands the same as on non-Indian lands." [Page 1.] * * * "The plumbing work must be inspected to ensure that it meets the county code standards." [Page 3.] * * * "The counties have the authority and, it appears, the intention to enforce applicable building codes on Indian land." [Page 4.]

Federal funds were not available to assist in the moving or rebuilding of the surplus housing.

Title 25, U.S.C. § 231,[5] enacted in 1929, concerns the enforcement of State laws affecting health and education. That statute provides that "The Secretary of the Interior, under such rules and regulations as he

[5]§ 231. Enforcement of State laws affecting health and education; entry of State employees on Indian lands.

The Secretary of the Interior, under such rules and regulations as he may prescribe, shall permit the agents and employees of any State to enter upon Indian tribal lands, reservations, or allotments therein (1) for the purpose of making inspection of health and educational conditions and enforcing sanitation and quarantine regulations or (2) to enforce the penalties of State compulsory school attendance laws against Indian children, and parents, or other persons in loco parentis except that this subparagraph (2) shall not apply to Indians of any tribe in which a duly constituted governing body exists until such body has adopted a resolution consenting to such application. Feb. 15, 1929 c. 216, 45 Stat. 1185; Aug. 9, 1946, c. 930, 60 Stat. 962.

may prescribe, shall permit agents * * * of any State to enter upon Indian tribal lands * * * for the purpose of making inspection of health * * * conditions and enforcing sanitation and quarantine regulations * * *." The statute was amended in 1946.

Direction of Indian affairs concerning sanitation facilities was transferred to the Surgeon General in 1954.

Plaintiff urges that the provision of Section 231 do not allow State entry on Indian lands without implementing rules and regulations by the Secretary.

The Supreme Court, in *Organized Village of Kake, et al. vs. Egan, Governor of Alaska,* 369 U.S. 60 (1962), in discussing the influence of State laws on Indian Reservations, stated:

> "Concurrently the influence of state law increased rather than decreased. As the result of a report making unfavorable comparisons between Indian Service activities and those of the States, Congress in 1929 authorized the States to enforce sanitation and quarantine laws on Indian reservations, to make inspections for health and educational purposes, and to enforce compulsory school attendance. 45 Stat. 1185, as amended, 25 U.S.C. § 231. * * *
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> "In 1953 Congress granted to several States full civil and criminal jurisdiction over Indian reservations, consenting to the assumption of such jurisdiction by any additional States making adequate provision for this in the future. 67 Stat. 588, 18 U.S.C. § 1162, 28 U.S.C. § 1360. * * * Thus Congress has to a substantial degree opened the doors of reservations to state laws, in marked contrast to what prevailed i the time of Chief Justice Marshall." [Pp. 73-74.]

The opinion of the Washington Supreme Court in *Snohomish County vs. Seattle Disposal Co.*, 425 P.2d 22, supra, upon which the plaintiffs and the Solicitor rely so heavily, in construing Public Law 280, says:

> "* * * the State has, of course, been granted jurisdiction to inspect and regulate health, sanitation and related matters on Indian Tribal lands. 45 Stat. 1185, 25 U.S.C. 231 * * *." [Page 27.]

The authorities do not appear to indicate that Section 231 requires implementing regulations by the Secretary of the Interior. See also *Acosta vs. County of San Diego*, 126 Cal. App. 2d 455, 563; 272 P.2d 92 (1954).

For the reasons noted above the Court concludes that under the provisions of Public Law 280, as codified, the Riverside County Ordinance No. 457 is enforceable on Indian Trust Land located in that County, that the Ordinance does not impose an "encumbrance" on such land nor does it constitute a regulation of use of the property inconsistent with any Fedral statute or valid regulation made pursuant thereto, and that although the Government may preempt the field of controlling the standards required as to the construction of dwellings on Indian Reservations, it has not seen fit to establish standards for construction generally on Indian Reservations except as to Government sponsored, financed and controlled projects.

It does not appear from the statutes or the legislative history of the Act, as codified in 25 U.S.C. 231, supra, or otherwise, that Congress intended to preempt the entire field of regulating health and sanitation on Indian lands. Federal statutes and regulations in the subject area are not sufficient to preempt the field unless the

purpose to effect that result is clearly manifested. *Reid vs. Colorado,* 187 U.S. 137, 148 (1902); *United States vs. Hatahley,* 220 F.2d 666 (10 C.A. 1955), reversed on other grounds, 351 U.S. 173.

As to the plaintiff Ricci, the Court concludes that the county of Riverside may not enforce the said Ordinance insofar as requiring her to obtain a permit for the building of her home, which was nearly completed when demand was first made upon her to obtain such permit.

Defendants' counsel are requested to prepare, serve and lodge Findings of Fact and Conclusions of Law and Judgment, in conformity with Local Rule 7.

This memorandum is not to be deemed a final judgment.

DATED: August 3, 1971

/s/ E. Avery Crary
E. AVERY CRARY
United States District Judge